

# **TRANSCRIPT OF RECORD.**

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**SUPREME COURT OF THE UNITED STATES.**

**OCTOBER TERM, [REDACTED] 1923**

**No. [REDACTED] 10**

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**ST. CLOUD PUBLIC SERVICE COMPANY, APPELLANT,**

**v.**

**CITY OF ST. CLOUD.**

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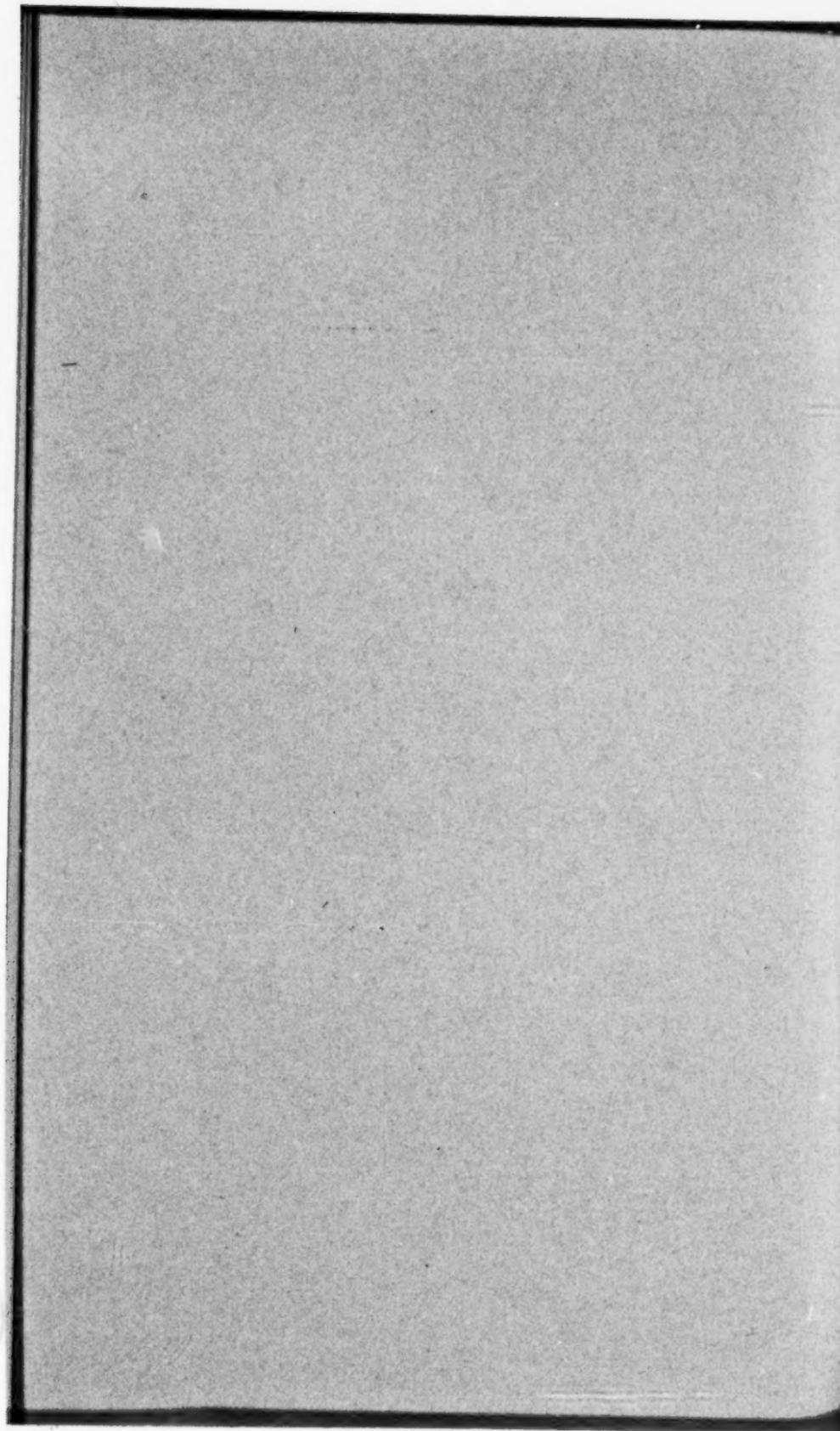
**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR  
THE DISTRICT OF MINNESOTA.**

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**FILED AUGUST 15, 1921.**

**(28,427)**



(28,427)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 472.

ST. CLOUD PUBLIC SERVICE COMPANY, APPELLANT,

vs.

CITY OF ST. CLOUD.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR  
THE DISTRICT OF MINNESOTA.

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1 & 2 United States District Court, District of Minnesota, Sixth Division.

In Equity.

No. 117.

ST. CLOUD PUBLIC SERVICE COMPANY, Complainant,  
vs.

CITY OF ST. CLOUD, Defendant.

Messrs. Cobb, Wheelwright & Benson,  
Minneapolis, Minnesota;

Pierce Butler, Esq.,  
St. Paul, Minnesota;

J. D. Sullivan, Esq.,  
St. Cloud, Minnesota,  
Solicitors for Complainant.

Ripley R. Brower, Esq.,  
St. Cloud, Minnesota,  
Solicitor for Defendant.

The following is a Transcript on Appeal to the Supreme Court of the United States in the above entitled cause of such portions of the record as are included in and designated by the Praeipe filed therefor by solicitors for the respective parties, shown at pages 259 to 263, inclusive, of this record, viz:

3 United States District Court, District of Minnesota, Sixth Division.

ST. CLOUD PUBLIC SERVICE COMPANY, Complainant,

vs.

CITY OF ST. CLOUD, Defendant.

*Amended Bill in Equity.*

To the Honorable, the Judges of the District Court of the United States, District of Minnesota:

The St. Cloud Public Service Company, a corporation created, organized and existing under and by virtue of the laws of the State of Minnesota, and having its office and principal place of business in the City of St. Cloud, in the County of Stearns, State of Minnesota, by leave of Court first had and obtained brings this its amended Bill

of Complaint against the City of St. Cloud, a municipal corporation created, organized and existing under and by virtue of the laws of the State of Minnesota; and thereupon your orator complains and alleges:

1. That your orator is a corporation duly created, organized and existing under the laws of the State of Minnesota and having its office and principal place of business in the City of St. Cloud, in the County of Stearns, in said State, and that the General nature of its business since the 17th day of August, 1915, has been and still is among other things manufacturing gas and distributing and selling the same to the City of St. Cloud and its inhabitants for illuminating and other purposes; that said corporation is a resident and citizen of the City of St. Cloud, Stearns County, Minnesota, and an inhabitant of said Sixth Division.
2. That the defendant, City of St. Cloud, is a municipal corporation organized under the laws of the State of Minnesota, and since the 28th day of November, A. D. 1911, has been governed by a so-called Home Rule Charter adopted by the people of said City under and pursuant to the constitution and laws of the State of Minnesota and is an inhabitant of said Sixth Division.
3. That the matter in dispute in this action exceeds, exclusive of interest and costs, the sum of Three thousand dollars (\$3,000).
4. That at all the times hereinafter mentioned The Public Service Company of St. Cloud, Minn., has been and still is a corporation created, organized and existing under and by virtue of the laws of the State of Minnesota. That during the month of December 1905, the Common Council of the defendant passed an ordinance which was approved by the Mayor of said City on the 19th day of December 1905, of which ordinance the following is a true and correct copy:

*"Ordinance No. 160.*

An Ordinance Granting the Right to Acquire, Construct, Maintain, and Operate Works for the Production, Manufacture, and Sale of Electricity and for the Manufacture and Sale of Gas in the City of St. Cloud, Minn.

The Common Council of the City of St. Cloud do ordain:

5. Section 1. That the right and privilege is hereby granted to the Public Service Company of St. Cloud, Minnesota, to acquire, construct, maintain and operate in the City of St. Cloud, Minnesota, works and instrumentalities for the production, manufacture, distribution and sale of electricity for illuminating, power, fuel and other purposes, and for the manufacture, distribution and sale of gas for illuminating, power, fuel and other purposes, and for that purpose to erect and maintain in all the streets, avenues, alleys and public places of the City of St. Cloud such poles, wires and cables as may be necessary for the purpose of the manufacture

distribution and sale of electricity, and to lay down in any of the streets, avenues, alleys and public places in the said City of St. Cloud such mains and service connections as may be necessary in the distribution and sale of gas for the purposes aforesaid.

The rights, privileges and franchises hereby granted shall expire on the first day of December, A. D. 1935.

Section 2. The grantee named in Section One of this ordinance is hereby authorized to produce, manufacture and vend electricity for lighting, fuel, power and other purposes and to manufacture and vend gas for light, fuel and other purposes to the City of St. Cloud and the inhabitants thereof for and during the period aforesaid.

Section 3. That the said grants shall vest in said grantee full power and license to make all necessary erections and excavations necessary for the purposes aforesaid under the direction of the City Engineer, but the same shall be done with due and reasonable dispatch and diligence and with the least practicable inconvenience to or interference with the rights of the public and individuals, and the said grantee shall restore all streets, alleys, sidewalks and public places where excavated by it to their original condition as far as practicable, and all damages done by such excavation shall be repaired by such grantee, and in case any obstructions caused by such excavations shall remain longer than twenty-four hours after notice to remove the same, or in case of neglect on the part of said grantee to protect any dangerous places by proper guards, then the said city may remove or protect the same at the cost of said grantee.

Section 4. That in laying down pipes or erecting wires, said grantee shall conform to all reasonable regulations prescribed by said city to prevent unnecessary injury to the streets, alleys, sidewalks and public places, and shall not interfere with or injure any water pipes, drains or sewers of said city.

Section 5. In consideration of the rights and privileges herein granted, the grantee hereby covenants and agrees that it will  
6 prior to the first day of January, A. D. 1907, erect or cause to be erected in the City of St. Cloud an efficient coal gas generating plant or system of ample capacity, and after the erection thereof will manufacture and offer for sale to the city and its inhabitants coal gas of at least fourteen candle power, and in the meantime will furnish gas from the present gas works of the grantee of the standard now manufactured therein.

Section 6. The grantee is authorized hereby to sell illuminating gas when the works therefor shall have been completed, of a standard of fourteen candle power at the price of not to exceed One Dollar and 85-100 (\$1.85) per thousand cubic feet, and fuel gas at the rate of not to exceed One and 35-100 Dollars (\$1.35) per thousand cubic feet, and the grantee shall be at liberty to cut off the supply from any person failing or refusing to pay for gas furnished for a period of thirty days.

Section 7. The rights hereby granted are upon the express condition that the City of St. Cloud may purchase the electric and gas works of the grantee on the first day of January, 1911, or at any five year interval thereafter at the appraised value of such works and system as a going concern. Whenever said city shall determine or desire to purchase said works, the Mayor thereof shall give written notice to the said grantee at or before the expiration of any term of years at the end of which said city may desire to make such purchase, of the intention of said city to purchase said works and demand of said grantee to appoint and select two persons to act as arbitrators in affixing and appraising the value of such works, which notice may be served upon any officer of said grantee or upon the chief officer in charge of the works by said city of St. Cloud; within thirty days after the service of said notice the said grantee and the said city shall each select two persons as appraisers; and in case of the failure of said city to appoint such appraisers such arbitration shall thereby be ended.

The four arbitrators thus chosen shall within ten days thereafter select a fifth, which five persons so selected shall within thirty days thereafter determine the value of the said electric and gas plants as hereinafter mentioned. And in case the said grantee shall fail or neglect to select such two arbitrators within the time hereinbefore required, or in case the four arbitrators shall neglect or refuse to choose a fifth arbitrator within the time hereinbefore required, then in either or both cases as may be, the two arbitrators or the five arbitrators or both, may be appointed by the judge or one of the judges of the District Court of the Judicial District in which said city shall

be situated, on the application of the Mayor of said city on ten  
7 days' notice in writing to said grantee or to the chief officer

in charge of said electric and gas plants. The persons selected as arbitrators shall not be residents of the city of St. Cloud or persons in the employ of said city or said grantee. Said five persons or a majority of the same, at a meeting of which all of said arbitrators shall have had personal notice, may and shall, as arbitrators, on examination and evidence, fix and determine the actual value of said electric and gas plants. And said appraisers shall make their award in writing, in duplicate, and deliver one duplicate to said grantee or the chief officer in charge of said electric and gas plants at said City of St. Cloud, and shall deliver the other to the City Clerk of said city within ten days after the same is made. And the said city shall thereupon have the right within thirty days thereafter to exercise the option to take the said electric and gas plants at the price so fixed, which purchase money shall be payable to the said grantee within six months from the time the said city shall select to purchase. And in case the said city shall, after such award, fail or refuse to so purchase, it shall pay the necessary expenses incurred by said grantee in and about the said awarding; but in case the city shall elect to purchase each party shall pay its own expenses so incurred and the expenses of the fifth arbitrator shall be paid equally by said city and said grantee. No failure of the city to purchase under any such award shall in any manner interfere with the

right of said city to have another award made and to purchase thereunder at the expiration of any other term of five years.

Section 8. Wherever the grantee is named or understood in this ordinance it shall be taken to mean and include The Public Service Company of St. Cloud, Minn., its successors and assigns.

Section 9. This ordinance shall take effect and be in force from and after its publication.

Passed at a regular adjourned meeting of the Common Council held on the 18th day of December, A. D. 1905, by the following vote:

Ayes: Ald. Doyle, Kaufmann, Kost, Schaefer, Schmitt, Smith, Spaniol, Steckling, Stephens and Pres. McCarty—10.

Nays: None.  
(Signed)

DAVID McCARTY,  
*President of the Council.*

Approved by the Mayor this 19th day of December, A. D. 1905.

JOHN N. BENSEN,  
*Mayor.*

Attest:

HENRY J. LIMPERICH,  
*City Clerk.*

8. That the said The Public Service Company of St. Cloud, Minn., is the grantee named in said ordinance.

5. That immediately after the passage of said ordinance the grantee therein named erected an efficient coal and water gas generating plant and system in the defendant City of ample capacity, and finished the erection thereof within the time specified by Section 5 of said ordinance, and until the 17th day of August, A. D. 1915, was continuously engaged in the business of generating, selling and distributing fuel gas to the defendant and to its inhabitants of the standard demanded by said ordinance through and by means of said generating plant.

6. That on the 17th day of August 1915, said The Public Service Company of St. Cloud, Minn., the grantee named in said ordinance, sold and conveyed all of its property in the defendant City (including its electric plant and its said gas generating plant) to complainant, and at the same time sold, assigned, transferred and set over to complainant the ordinance hereinbefore mentioned and all of the said grantee's right, title and interest therein and thereto, and since said last mentioned date complainant has been manufacturing, selling and distributing fuel gas to the defendant and to its inhabitants under said ordinance, using and employing for that purpose the said gas generating plant hereinbefore and hereinafter described.

7. That at the time of the verification and filing of the original bill and for a long time prior thereto, and at the time of the filing

of this amended bill, the fair and reasonable value of the complainant's property owned by it and used and useful for the manufacture and distribution of gas to the City of St. Cloud, the defendant above named, and to its inhabitants, was and is a sum in excess of Four hundred and forty-four thousand dollars (\$444,000.00).

8. That the following table gives the actual cost of complainant's said gas property, exclusive of real estate, necessarily used by it in the manufacture, distribution and sale of gas in the defendant City, year by year (excepting for the year 1909), commencing with the year ending December 31, 1907, incurred by the grantee named in said ordinance while it was operating said gas property, and by complainant since the 17th day of August 1915:

Year.	Cost.
1907 .....	\$92,466.69
1908 .....	94,212.08
1910 .....	105,570.08
1911 .....	108,462.37
1912 .....	111,974.16
1913 .....	115,702.67
1914 .....	119,332.54
1915 .....	123,046.53
1916 .....	150,722.01
1917 .....	159,755.01
1918 .....	168,961.56
1919 .....	189,981.56
August 31, 1920 .....	194,057.03

9. That included in the foregoing amounts is the sum of \$29,875.54 and no more, representing the value of the complainant's gas property in the City of St. Cloud installed and in use prior to the passage and approval of the ordinance described in paragraph 4 hereof. That some of the property represented by said sum of \$29,875.54 is still in use; and that all the balance thereof has been purchased and installed since the date of the passage of said ordinance.

10. 10. That the foregoing figures set out in paragraph 8 hereof, do not include any of the following overhead charges, to-wit:

- (a) Interest during construction,
- (b) Taxes or insurance,
- (c) Discount on bonds,
- (d) Any of the expenses incurred by the President and paid out by him on various trips to Chicago and Minneapolis in arranging with engineers, selling of bonds, buying material, etc.,
- (e) No charge for any of the bookkeeping or any office rent,

(f) No charge for general superintendence of the President or managers during construction.

11. That the said gas properties of complainant are well located, planned and have been economically constructed; they have always been well and economically and efficiently managed; and they have always been and still are maintained in a first class condition so that the defendant City and its inhabitants have always been furnished with proper and adequate gas service.

12. That all of the expenses of complainant in the management and operation of its said gas business and those of its predecessor, the grantee named in said ordinance, have been reasonable and have been as low in amount as could be made by economical management; that the services of all officers, agents and employes have been secured as cheaply as practicable for good service, and neither it nor its predecessor has ever had more of such officers, agents and employes than have been necessary for the proper conduct of said gas business in an efficient, proper and satisfactory manner.

11 13. That the construction of complainant's said gas plant was commenced early in the spring of 1906 and the gas was turned on in December of that year. That for the year ending December 31, 1907, after paying all of its manufacturing, distribution and general expenses in its said gas business, the grantee named in said ordinance had an operating deficit of the sum of \$403.21; that the foregoing figures do not include anything for discounts, interest, depreciation, office expenses, taxes or bad debts.

14. That for the year ending December 31, 1908, after paying all of its manufacturing, distribution and general expenses incurred in its said gas business, said grantee had net earnings to the extent of \$1,240.15, and no more. That the foregoing figures do not include anything for discounts, interest, office help, rent and not a sufficient or adequate sum for depreciation.

15. That for the year ending December 31, 1909, after paying all of its said manufacturing, distribution and general expenses, said grantee had net earnings to the extent of \$3,053.37 and no more. That the foregoing figures do not include anything for taxes, insurance, depreciation, interest, office rent or uncollectible bills.

16. That during the year ending December 31, 1910, after paying all of the manufacturing, distribution and general expenses, said grantee had left net earnings to the extent of \$3,787.07 and no more. That the foregoing figures do not include anything for discounts, interest, depreciation, bad debts, taxes, insurance or office rent.

17. That during the year ending December 31, 1911, after paying all manufacturing, distribution and general expenses, said grantee had left for net earnings the sum of \$2,172.04 and no more. That

the foregoing figures do not include anything for discounts, interest, office help, rent and a proper or adequate sum for depreciation.

18. That for the year ending December 31, 1912, after paying all manufacturing, distribution and general expenses, said grantee had left as net earnings the sum of \$4,389.20 and no more. That the foregoing figures do not include any charges for light, interest, discounts, bad debts, nor for a proper or adequate sum for depreciation.

19. That during the year ending December 31, 1913, after paying all manufacturing, distribution and general expenses, said grantee had left as net earnings the sum of \$1,728.81 and no more. That the foregoing figures do not include interest, office rent, uncollectible bills or discounts.

20. That for the year ending December 31, 1914, after paying manufacturing, distribution and general expenses, said grantee had left as net earnings the sum only of \$7,008.56; that the foregoing figures do not include interest, discounts, bad debts or adequate depreciation charges.

21. That for the year ending December 31, 1915, after paying all manufacturing, distribution and general expenses, the net earnings derived from said gas business amounted to the sum of \$8,170.97.

13        22. That for the year ending December 31, 1916, after paying all manufacturing, distribution and general expenses complainant had left as net earnings the sum only of \$6,230.09.

23. That for the year ending December 31, 1917, after paying for manufacturing costs, distribution expenses and general expenses, the complainant had an actual operating deficit of \$3,938.31; that is to say, its receipts from all sources did not pay costs of operation by said sum.

24. That for the year ending December 31, 1918, after paying all manufacturing, distribution and general expenses, complainant had an actual operating deficit in the sum of \$15,897.40.

25. That for the year ending December 31, 1919, after paying all manufacturing, distribution and general expenses, complainant had a net operating deficit in the sum of \$21,129.80.

26. That for the eight months ending August 31, 1920, after paying all manufacturing costs, distribution expenses and general expenses, complainant had an operating deficit of the sum of \$18,889.27.

27. That all of the figures set forth in paragraphs 13 to 25, both inclusive, relate only to complainant's said gas business and that of its said predecessor.

28. That the net operating deficits hereinbefore alleged for the years 1917, 1918, 1919 and the first eight months of the year

1920, were not due to any fault or neglect on the part of complainant, but were due solely to the conditions arising out of the World War, because of which there was an enormous increase in the cost of labor employed by complainant in its gas plant and in the cost of coal, coke and oil (otherwise known as petroleum distillate), which materials have always been necessarily used and employed by complainant in the manufacture of its gas.

14 29. That complainant and its predecessor, the grantee named in said ordinance, have never sold anything but gas for fuel purposes, there having been no demand in the defendant City for gas for illuminating purposes. That since the 1st day of November A. D. 1919, complainant has been selling its said gas to its consumers at the rate specified in said ordinance, to-wit, the sum of \$1.35 per thousand cubic feet. That on the 1st day of April 1916, complainant put into effect a step rate for gas as follows:

	Gross per 1,000 cu. ft.	Discount per 1,000 cu. ft.	Net per 1,000 cu. ft.
First 5,000 Cubic Feet.....	\$1.35	10e	\$1.25
Next 5,000 " " .....	1.30	10	1.20
" 5,000 " " .....	1.25	10	1.15
" 10,000 " " .....	1.20	10	1.10
" 15,000 " " .....	1.10	10	1.00
" 15,000 " " .....	1.00	10	.90
" 20,000 " " .....	.90	10	.80
" 40,000 " " .....	.80	10	.70
" 80,000 " " .....	.75	10	.65
Over 200,000 " " .....	.70	10	.60
	.60	10	.50

That on the 1st day of March 1918, the ten cent per thousand cubic feet discount for prompt payment of bills was discontinued and as hereinbefore alleged since the 1st day of November 1919, all gas has been sold at the ordinance rate, to-wit, \$1.35 per thousand cubic feet.

30. That the gas and electric operations of complainant and of its said predecessor, the grantee named in said ordinance, as well as all the operations of its street railway, have always been and are now conducted as distinct and separate departments.

15 31. That attached hereto, marked Exhibit "A", and hereby made a part hereof, is a tabulated statement commencing on the 21st day of February 1914, and ending on the 6th day of September 1920, showing the price per ton for Youghiogheny coal and Elkhorn coal f. o. b. on the docks at Superior, Wisconsin, which coal from time to time has been employed by the complainant and its said predecessor in the manufacture of said gas. That said tabulated statement also shows the freight per ton

from Superior to St. Cloud and the price for handling the same per ton.

32. That attached hereto, marked Exhibit "B," and hereby made a part hereof, is a tabulated statement commencing on the 21st day of January 1918, and ending on the 20th day of September 1920, showing the prices paid for coke by complainant, together with the freight charges per ton paid thereon and the handling per ton.

33. That attached hereto, marked Exhibit "C" and hereby made a part hereof, is a tabulated statement from the 1st day of January 1914, to the 10th day of September 1920, showing the price paid by complainant and its said predecessor for oil (petroleum distillate) used by complainant and its said predecessor in the manufacture of its water gas, said price being expressed in cents per gallon, together with the freight charges thereon from Oklahoma, group No. 3, to St. Cloud.

34. That owing to the increase in freight rates which became effective on the first day of September 1920, the price which complainant must pay for the coal, coke and oil employed by it in the manufacture of gas will be very materially increased; that there is nothing in present conditions to indicate that for months to come, and possibly for years, there will be any decrease in labor costs or in the cost of coal, coke and oil.

16 35. That according to the last State census, for the year 1905, the defendant City had a population of 8,866; and that on the 30th day of September 1920, complainant had in use only 1,265 gas meters.

36. That the maximum rate fixed for the price of gas in the ordinance described in paragraph 4 hereof has never yielded to complainant or its predecessor a fair or reasonable return on the value of its property used and useful in its said gas business; nor taking the whole term prescribed and fixed by said ordinance, assuming that the defendant never exercises the right to purchase complainant's gas plant as provided therein, or whether it does so or not, can the complainant ever make any fair or reasonable return on the value of its said property necessarily used and employed by it in its said gas business, nor as a matter of fact any return whatsoever.

37. That under the Constitution and laws of the State of Minnesota the defendant is a city of the fourth class. That on the 31st day of August 1920, complainant presented to the Commission of the City of St. Cloud a petition, a copy of which marked Exhibit "D," is hereto attached and hereby made a part of this amended bill. That under the Home Rule Charter of the City of St. Cloud said Commission is the body to whom such petition should have been submitted.

38. That on the 28th day of September, 1920, said petition of complainant was rejected by said Commission without any consid-

eration thereof upon the merits, but upon the ground that said Commission had no jurisdiction to entertain such a petition.

39. That as hereinbefore alleged at no time since the passage and approval of the ordinance described in paragraph 4 of this amended bill has the maximum rate to be charged for gas fixed therein been adequate or sufficient to pay complainant's necessary operating expenses or that of its predecessor in the manufacture and distribution of its gas and yield a fair or reasonable return on the fair value of said property necessarily devoted to said gas business and to public use. That as hereinbefore alleged since the first day of January 1917, said maximum rate has not been adequate or sufficient to even pay said complainant's operating expenses necessarily expended in the operation of its said gas business.

40. That in order to pay its necessary operating expenses complainant must have at least a rate of \$1.90 per thousand cubic feet and in order to pay its operating expenses and to secure a fair and reasonable return on the fair value of its property necessarily devoted to its gas business, a rate of \$3.39 per thousand cubic feet is necessary, and complainant intends to increase its said present rate to said price of \$3.39 per thousand cubic feet.

41. That said present maximum rate fixed by said ordinance is inadequate and confiscatory, the effect of which is to deprive complainant of its property without due process of law and to take it for public use without just compensation, in violation of the fifth amendment and the fourteenth amendment to the Constitution of the United States.

42. That unless the defendant is enjoined and restrained from so doing it will attempt to force complainant to continue to sell its gas at the maximum rate prescribed by said ordinance and any interference with the collection of such increased rate which complainant proposes to charge will deprive it of its property without due process of law and take it for public use without just compensation in violation of the fifth amendment and the fourteenth amendment to the Constitution of the United States.

18        43. That controversies, confusion, risks and multiplicity of suits will result from the resistance of the complainant to the enforcement of the said inadequate and confiscatory rates prescribed in said ordinance.

44. That even if defendant should temporarily interfere (as it will do and as it threatens to do unless it is enjoined and restrained from so doing as hereinafter prayed) with the collection by complainant of its said proposed increased rate, the effect thereof would be to deprive complainant of its property without due process of law and to take it for public use without just compensation, in violation of the fifth amendment and the fourteenth amendment to the Constitution of the United States, and would result in inflict-

ing great and irreparable loss and injury on complainant, all in violation of complainant's rights respecting the subject matter of this action and any judgment of this Court entered herein would be thereby rendered ineffectual.

In consideration of the premises and forasmuch as your orator is wholly remediless in the premises according to the strict rules of the common law, and can only have relief in a Court of equity where matters of this nature are properly cognizable and relievable, your orator prays:

1. That the Court adjudge and decree that the maximum rate to be charged by complainant for its gas fixed by the ordinance described in paragraph 4 of this amended bill, is confiscatory and non compensatory and that to force your orator to continue to sell its gas at said rate would be to deprive it of its property without due process of law and to take it for public use without just compensation, in violation of the fifth amendment and the fourteenth amendment to the Constitution of the United States.
2. That it be adjudged and decreed that your orator be granted a writ of permanent injunction issuing out of and under the seal of this Honorable Court against the defendant, its City Council, its Commission, and all of its officers, agents, attorneys, representatives and departments, restraining and enjoining them and each of them from in any manner, by ordinance or otherwise, interfering with your orator in raising the rate to be charged for its gas to the sum of \$3.39, or from instituting or authorizing or directing any suit or suits, action or actions, or any proceeding whatsoever against your orator, or any of its officers, agents or employes, the object or purpose of which or the relief sought in any such action, suit or proceeding is to interfere with or restrain or enjoin your orator from putting into effect said increased rate, or from attempting to force your orator to continue to sell its gas at the rates prescribed by said ordinance.
3. That a temporary or preliminary injunction be issued herein and out of this Honorable Court pending this action, restraining and enjoining the defendant, its City Council, its Commission and all of its officers, agents, employes, representatives and departments, and their respective successors and officers, in each of the particulars aforesaid; and that an order to show cause issue to the defendant why such preliminary injunction should not issue.
4. That a writ of subpoena of the United States of America in the usual form and under the usual penalties be directed to the defendant, the City of St. Cloud, commanding it to be and appear before this Honorable Court and to answer this amended bill of complaint (but not under oath, its answer under oath being hereby expressly waived) and to abide by and perform such orders and decrees in the premises as to the Court shall seem meet and proper. And that your orator may have such

other and further relief in the premises as to your Honors may seem meet and proper. And your orator will ever pray, etc.

ST. CLOUD PUBLIC SERVICE COMPANY,

By A. G. WHITNEY, *Its President.*

J. D. SULLIVAN,

St. Cloud, Minnesota;

COBB, WHEELWRIGHT &  
BENSON,

Minneapolis, Minnesota,

*Solicitors for Complainant.*

J. O. P. WHEELWRIGHT,  
*Of Counsel.*

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### EXHIBIT "A."

#### *Coal.*

Month & year.	Price per ton f. o. b. Superior Yough. lump.	Price per ton f. o. b. Superior Elkhorn lump.	Fr. per ton.	Handling per ton.
<b>1914.</b>				
Fed. 2.....	\$3.55	1-1-14.....	\$4.05	\$1.05
		3-1-14.....	3.80	"
		6-1-14.....	3.55	"
<b>1915.</b>				
3-1.....	3.30	3-1.....	3.80	"
7-15.....	3.40	5-1.....	3.65	"
		6-1.....	3.80	"
<b>1916.</b>				
1-1.....	3.65	1-1.....	3.80	"
9-1.....	3.90	4-1.....	3.85	"
10-1.....	4.00	5-1.....	4.00	"
10-24.....	4.25	9-1.....	4.25	"
11-15.....	5.50	10-4.....	4.35	"
		10-24.....	4.60	"
<b>1917.</b>				
1-1.....	5.50	1-1.....	4.60	1.24
8-7.....	7.00	8-7.....	8.00	"
11-1.....	6.60	11-1.....	7.20	"
12-9.....	6.18			"
<b>1918.</b>				
1-1.....	6.18	1-1.....	7.20	"
3-13.....	6.60	6-1.....	6.30	"
6-1.....	5.80	9-20.....	6.68	"
8-21.....	6.18			"

Month & year.	Price per ton f. o. b. Superior Yough. lump.	Price per ton f. o. b. Superior Elkhorn lump.	Fr. per ton.	Handling per ton.
<b>1919.</b>				
5-1.....	5.65	2-20.....	6.68	1.55
6-9.....	5.35	5-1.....	6.00	"
6-24.....	5.50	5-2.....	6.25	"
8-1.....	5.75	9-15.....	6.50	"
9-15.....	6.00	10-1.....	6.75	"
10-1.....	6.25	10-30.....	8.00	"
10-30.....	6.50			"
<b>1920.</b>				
2-13.....	6.50	2-13.....	8.00	"
4-28.....	8.00	5-11.....	9.50	"
5-11.....	8.25	6-1.....	9.75	"
6-1.....	8.75	6-29.....	10.25	2.08½
6-29.....	9.25	7-12.....	10.75	"
8-12.....	9.75	8-25.....	11.75	"
8-25.....	10.75	9-7.....	12.00	"
9-7.....	11.00	9-10.....	12.30	"
9-10.....	11.30	9-25.....	13.50	"
9-13.....	12.60	10-6.....	14.00	"
9-23.....	13.50			"
10-6.....	14.00			"

## EXHIBIT "B."

Month & year.	Price per ton f.o.b. St. Paul.	Fr. per ton.	Handling per ton.
<b>1918.</b>			
1-21.....	\$10.55	\$.08	45¢
7-11.....	11.70	1.55	"
9-3.....	11.40	"	"
10-5.....	11.78	"	"
10-23.....	11.57	"	"
<b>1919.</b>			
1-9.....	11.43	"	60¢
3-26.....	10.43	"	"
4-15.....	8.40	"	"
8-10.....	8.90	"	"
9-5.....	10.50	"	"
<b>1920.</b>			
4-1.....	11.50	"	"
6-4.....	12.00	"	35¢
7-1.....	14.00	"	"
8-10.....	15.50	"	"
9-20.....	16.50	2.08½	"

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## EXHIBIT "C."

*Oil.*

Month & year.	Price per gal. f. o. b. group 3, Oklahoma.	Frt. per gal.
1914.		
1-1 . . . . .	3¢	3.1¢
4-1 . . . . .	3-1/4¢	"
5-1 . . . . .	2-3/4¢	"
6-1 . . . . .	2¢	"
8-1 . . . . .	1-7/8¢	"
1-1 . . . . .	2¢	"
2-1 . . . . .	1-1/4¢	"
4-1 . . . . .	1¢	"
5-1 . . . . .	1-3/8¢	"
6-1 . . . . .	1¢	"
7-1 . . . . .	1-1/2¢	"
9-1 . . . . .	1-7/8¢	"
1916.		
1-1 . . . . .	5¢	"
2-1 . . . . .	1-1/2¢	"
3-1 . . . . .	3-7/8¢	"
4-1 . . . . .	1.2¢	"
6-1 . . . . .	2-7/8¢	"
8-1 . . . . .	2-3/4¢	"
10-1 . . . . .	1-1/2¢	"
1917.		
2-1 . . . . .	2-7/8¢	"
6-1 . . . . .	2-1/4¢	"
8-1 . . . . .	3-7/8¢	"
10-1 . . . . .	4-3/4¢	"
12-1 . . . . .	5-1/4¢	"
1918.		
1-1 . . . . .	6¢	"
2-1 . . . . .	7-1/2¢	"
3-1 . . . . .	5-5/8¢	"
7-1 . . . . .	5-3/4¢	"
8-1 . . . . .	5-1/2¢	"
1919.		
2-1 . . . . .	4-3/4¢	"
3-1 . . . . .	3-7/8¢	"
7-1 . . . . .	5-3/4¢	"
8-1 . . . . .	5-1/2¢	"

Month & year.	Price per gal. f. o. b. group 3, Oklahoma.	Fr. per gal
1919.		
2-1 .....	4-3/4¢ .....	3.1¢
3-1 .....	3-7/8¢ .....	"
4-1 .....	3-1/2¢ .....	"
5-1 .....	3-1/4¢ .....	"
6-1 .....	3-1/2¢ .....	"
7-1 .....	3-1/4¢ .....	"
8-1 .....	2-3/4¢ .....	"
9-1 .....	3-3/4¢ .....	"
11-1 .....	4-1/2¢ .....	"
12-1 .....	6-1/2¢ .....	"
1920.		
1-1 .....	7-1/10¢ .....	"
2-1 .....	7¢ .....	"
3-1 .....	8-3/10¢ .....	"
4-1 .....	10¢ .....	"
6-1 .....	9-6/10¢ .....	"
7-1 .....	9¢ .....	"
8-1 .....	9-4/10¢ .....	"
9-1 .....	8¢ .....	4-1/4¢
10-1 .....	7¢ .....	"

*Petition.*

To the Hon. City Commissioners of the city of St. Cloud, Minnesota.  
**GENTLEMEN:**

The undersigned St. Cloud Public Service Company, a Minnesota corporation, respectfully petitions your Honorable Body and represents to you as follows:

That it is the owner of a franchise granted to it by the City of St. Cloud, Minnesota, under which, for a number of years last past, it has been furnishing gas to the citizens of said city and is now operating and furnishing gas to the citizens thereof under said franchise. That owing to the increased cost of everything in the way of either labor or materials that enter into the production of gas to consumers the cost of giving adequate service under said franchise, as is well known to your Honorable Body, is increased to such an extent that your petitioner is now, and has been, furnishing gas to the citizens of St. Cloud at a very great loss to your petitioner.

Your petitioner, therefore, asks of your Honorable Body, pursuant to Chapter 469 of the Laws of Minnesota for the year 1919, that you do, within sixty (60) days after the filing of this petition, investigate

the question of the cost of producing and supplying gas to the citizens of the city of St. Cloud, and that after such investigation that you prescribe such a rate for gas as shall permit the undersigned to make a reasonable return upon the capital invested in their business of producing gas under an economical and efficient management of the same.

25 Your petitioner further shows to your Honorable Body that upon its part it is willing to comply with the provisions of said law and is willing, upon its part, to give to your Honorable Body or any agent authorized by you, complete access to its books so that you may be able to obtain such information as is necessary and proper for the determining of what is a just rate for gas in the city of St. Cloud under existing conditions.

Dated at St. Cloud, Minnesota, this 4th day of May, 1920.

ST. CLOUD PUBLIC SERVICE CO.,  
By A. G. WHITNEY,  
*President.*

26 United States District Court, District of Minnesota, Sixth Division.

ST. CLOUD PUBLIC SERVICE COMPANY, Complainant,  
vs.  
CITY OF ST. CLOUD, Defendant.

STATE OF MINNESOTA,  
*County of Stearns, ss:*

A. G. Whitney being first duly sworn on his oath says:

That he is the President of the complainant, St. Cloud Public Service Company, and has been such President ever since its organization. That he has been the active manager of complainant and of its business during all of said time, including its gas business; that he is thoroughly familiar with all of its property, with all of its business affairs, with the operation of its gas plant, and with all of its property used and employed in the City of St. Cloud in the manufacture and sale of gas.

Deponent further says that he has read the foregoing amended bill in equity and knows the contents thereof, and that the statements and allegations therein contained are true of his own knowledge.

Further affiant saith not, save that he makes this affidavit of verification in order that the same may be used as an affidavit in support of a motion or an order to show cause for a preliminary injunction in the above entitled cause as prayed for in the amended bill of complaint.

A. G. WHITNEY.

18 ST. CLOUD PUB. SERV. CO. VS. CITY OF ST. CLOUD.

Subscribed and sworn to before me this 8th day of December 1920.  
GEO. PLANK, [Notarial Seal.]  
*Notary Public, County of Stearns, Minnesota.*

My commission expires August 25, 1922.

27 Filed in U. S. District Court December 23, 1920.

28 District Court of the United States, District of Minnesota,  
Sixth Division.

ST. CLOUD PUBLIC SERVICE COMPANY, Complainant,  
vs.

CITY OF ST. CLOUD, Defendant.

The Clerk will enter my appearance for the defendant.

R. B. BROWER,  
*City Attorney and Attorney for Defendant.*

St. Cloud, Minnesota.

Filed in U. S. District Court November 30, 1920.

29 United States District Court, District of Minnesota, Sixth  
Division.

ST. LOUIS PUBLIC SERVICE COMPANY, Complainant,  
vs.

CITY OF ST. CLOUD, Defendant.

*Answer.*

The defendant, City of St. Cloud, for its answer to the complainant's Amended Bill of Complaint herein, respectfully shows to the Court as follows:

1. Admits and alleges, that the defendant is a municipal corporation, organized, created and existing under and by virtue of the laws of the State of Minnesota. That said City of St. Cloud was originally incorporated as the Town of St. Cloud, under a special act of the Legislature of the State of Minnesota, passed and approved on March 8th, 1862, said statutory enactment being Chapter One of the Special Laws of Minnesota for 1862. That thereafter, and in the year 1868, under and by virtue of the provisions of Chapter 28 of the Special Laws of Minnesota for 1868, the said defendant was incorporated under the name of the City of St. Cloud. That it operated under said Special Laws of 1868, with certain amendments subsequently passed by the Legislature of the State of Minnesota, altering and amending the same, until the 13th day of April, 1889. That in the year

1889, Chapter 6 of the Special Laws of Minnesota for 1889, duly passed by the Legislature of said State of Minnesota, and approved by the executive department, on April 13th, 1889, was duly enacted, and that the said City of St. Cloud then and there came under the said legislative enactment, which was entitled,

"An Act to Consolidate in One Act the Charter of the City of St. Cloud, and to Amend the Same."

30 That said City of St. Cloud continued to operate under the terms and provisions of said Chapter 6 of said Special Laws of Minnesota for 1889, until the adoption of its Home Rule Charter, which was duly adopted under the general provisions of the Laws of Minnesota, by vote of the people of said City of St. Cloud, on November 28th, 1911. That since November 28, 1911, the defendant has operated under the said Home Rule Charter of the City of St. Cloud, as thus adopted on November 28, 1911.

2. Alleges, that under and by virtue of the provisions of said Chapter 6 of said Special Laws of Minnesota for 1889, legislative power was specifically delegated to said defendant, City of St. Cloud, and to the Common Council of said City of St. Cloud, by ordinance, under the specific terms and conditions of Section 5, and other provisions of said Special Laws, to do the following municipal acts, and make the following specific municipal reservations, and impose the following conditions, and enter into stipulations and contractual ordinances with respect to the following subjects, to-wit:

"See. 5. The common council shall have full power by ordinance:

10th. \* \* \* To provide for and control the erection and operation of gas works, electric lights, or other works or material for lighting the streets and alleys, public grounds, and buildings of said city, and supplying light and power to said city and its inhabitants; and to grant the right to erect, maintain and operate such works, with all rights incident or pertaining thereto, to one or more private companies or corporations, and to control the erection and operation of such works and laying of pipes, mains, and wires into, through and under the streets, avenues, alleys, and public grounds of said city, and the erection of poles and mainstays and the stringing of wires thereon, over, in, upon, and across the streets, alleys and public grounds; to provide for and control the erection and operation of works for heating the public buildings of said city by steam, gas, or other means, and supplying light, heat, and power to the inhabitants of said city; to grant the right to erect such works and all incident rights to one or more private companies or corporations, and to control and regulate the erection and operation of such works,

31 and the laying of mains into, through, and under the streets, alleys and public grounds of said city; provided, that every grant to a company or corporation of the right to erect or maintain any of said works shall provide that the city or its successor may purchase the same at such time and in such manner as shall be prescribed in the grant; and provided further, that the common

council shall have authority to regulate and prescribe the fees and rates and charges of any and all companies hereinbefore mentioned.

"34th. To regulate and control the quality and measurement of gas. To prescribe and enforce rules and regulations for the manufacture and sale of gas, the location and construction of gas works, and the laying, maintaining and repairing of gas pipes, mains and fixtures, to provide for the inspection of gas and gas meters, and to appoint an inspector if needed and to prescribe his duties."

3. Alleges, that under and by virtue of the terms and provisions of said Home Rule Charter of the said City of St. Cloud, and under the particular provisions of subdivisions 10 and 32 of Section 74 thereof, the Council of the said City of St. Cloud was duly authorized and empowered by ordinance:

"10th. \* \* \* To provide for and control the erection and operation of gas works, electric lights, or other works or material for lighting the streets and alleys, public grounds and buildings of said city and supplying light and power to said city and its inhabitants; and to grant subject to ratification by the voters of the city as hereinafter provided, the right to erect, maintain and operate such works with all rights incident or pertaining thereto, to one or more private companies or corporations, and to control the erection and operation of such works, and the laying of pipes, mains and wires into, through and under the streets, avenues, alleys and public grounds of said city, and the erection of poles and mainstays; and the stringing of wires thereon, over, in, upon and across the streets, alleys and public grounds; to provide for and control the erection and operation of works for heating the public buildings of said city by steam, gas or other means, and supplying light, heat and power to the inhabitants of said city; to grant subject to ratification by the voters of the city as hereinafter provided, the right to erect such works and all incident rights to one or more private companies or corporations, and to control and regulate the erection and operation of such works, and the laying of mains into, through and under the streets, alleys and public grounds of said city; to grant subject to ratification by the voters of the city as hereinafter provided, to any person or persons, corporation or corporations the right to occupy and use the streets alleys and public grounds of said city for the purpose of maintaining, operating and conducting, any railroad, telegraph, telephone or street car line, and to provide and regulate the manner in which the said streets, alleys and public grounds shall be used, as well as the length of time the uses shall continue; Provided, that the Commission shall have authority to regulate and prescribe the fees and rates and charges of any and all companies hereinbefore mentioned.

32nd. To regulate and control the quality and measurements of gas, to prescribe and enforce rules and regulations for the manufacture and sale of gas, the location and construction of gas works, and the laying, maintaining and repairing of gas pipes, mains and fix-

tures, to provide for the inspection of gas and gas meters, and to appoint an inspector if needed, and to prescribe his duties."

4. That the provisions, stipulations and delegated powers, so delegated by the Legislature to the said City of St. Cloud and its Common Council by the terms of said Act, consisting of said Chapter 6 of said Special Laws of Minnesota for 1889, remained unchanged, and were never modified by repeal, amendment or restriction, between the date of the passage and approval of said Special Act, and the date of the adoption, by the electors of said City of St. Cloud, of its Home Rule Charter, and was in all its terms in full force and effect on the date of the passage and approval of said contractual Ordinance No. 160, of said City of St. Cloud.

5. Alleges, that The Public Service Company of St. Cloud, Minn., prior to the month of December, 1905, was duly incorporated under the laws of the State of Minnesota as a public service corporation, to manufacture, distribute and sell, for illuminating, power, fuel, and other purposes, electricity, and to manufacture, distribute and sell, gas for illuminating, power, fuel and other purposes, within the City of St. Cloud, and elsewhere in the State of Minnesota, under and pursuant to such ordinances, permits and licenses, contractual or otherwise, that might be duly enacted by the several municipal bodies of the municipalities wherein it desired to carry on and conduct its public service business.

That on and prior to the 19th day of December, 1905, the  
33 said The Public Service Company of St. Cloud, Minn., was  
an applicant to the City of St. Cloud, and to the Common  
Council thereof, acting under the delegated legislative authority pro-  
vided for in said Chapter 6 of said Special Laws of Minnesota for  
1889, for a certain contractual franchise ordinance, submitted by it,  
The Public Service Company of St. Cloud, Minn., for the consider-  
ation of the Common Council of said City of St. Cloud. That at  
the time of the enactment and passage of said contractual ordinance,  
the same being Ordinance No. 160, set out in full in the complain-  
ant's Amended Bill in Equity herein, said The Public Service Com-  
pany of St. Cloud, Minn., desired to secure the privilege of con-  
structing, erecting and completing certain gas works and systems for  
the manufacture, distribution and sale to the City and its inhab-  
itants, of certain illuminating and fuel gas, and that it, said The  
Public Service Company of St. Cloud, Minn., did propose to the  
Common Council of the City of St. Cloud, that if the said grantee  
in said ordinance was granted the franchise privileges therein em-  
bodied, that said grantee would, in consideration thereof, covenant  
and agree that it would, prior to the first day of January, 1907, erect,  
or cause to be erected, in the City of St. Cloud, an efficient coal gas  
generating plant or system of ample capacity, and after the erection  
thereof, would manufacture and offer for sale to the City and its in-  
habitants, coal gas of at least fourteen candle power, and in the  
meantime would furnish gas from the present gas works of the  
grantee of the standard manufactured therein.

That under the terms and provisions of Section 6 of said Ordin-

nance No. 160, then under consideration, that it would further propose to be authorized by said contractual ordinance, to sell illuminating gas, when the works should have been completed, of 34 a standard of fourteen candle power, at the price of not to exceed One and 85/100 Dollars (\$1.85) per thousand cubic feet, and fuel gas at the rate of not to exceed One and 35/100 Dollar- (\$1.35) per thousand cubic feet, and that the grantee should be at liberty to cut off the supply from any person failing or refusing to pay for gas for a period of thirty days.

That pursuant to said proposal and proffered agreement and contract, the Common Council of the said City of St. Cloud, on the 18th day of December, 1905, did duly pass and enact said contractual Ordinance No. 160, embodying the terms of said proposal and contract therein, and that the said contractual ordinance was duly approved by John N. Bensen, the duly elected, qualified and acting Mayor of said City of St. Cloud, on the 19th day of December, 1905, and that said ordinance, and all of its terms, thereupon became effective by due publication, as provided by law.

6. Alleges, that said The Public Service Company of St. Cloud, the grantee in said ordinance, although not being required by the said ordinance to accept in writing the terms thereof, did duly accept in all things, the terms, provisions, contractual stipulations, burdens and obligations of said Ordinance No. 160. That it did enter the said City of St. Cloud and erect, construct and complete, under the terms of said ordinance, its gas generating plant, on or prior to the first day of January, 1907, and that it did enter upon the streets, highways and public places of the City of St. Cloud, and lay down in said streets, avenues, alleys and public places, mains and service connections necessary in the distribution and sale of gas within said City of St. Cloud, and to the inhabitants thereof. That said The Public Service Company of St. Cloud, Minn., did avail itself in other ways of the beneficial terms and provisions of said contractual 35 ordinance, and that it did, from and after the 19th day of December, 1905, erect, construct and maintain certain works

for the generation, distribution and sale of its electricity for light and power purposes, not only to the city of St. Cloud, but to the inhabitants thereof, and did enlarge, construct, reconstruct and improve its works for the generation of gas and electricity, and did extend its transmission lines and its service mains in, upon and under said streets, avenues, alleys and public places of the City of St. Cloud, and did thereafter, continuously, until the date hereinafter stated, engage in said lines of business, and did take, secure and retain large revenues, tolls and income from the manufacture, distribution and sale of its said electric current and gas. That said The Public Service Company did in all things accept, assume and undertake to perform all the terms, provisions, stipulations and contractual features of said Ordinance No. 160, with respect to the manufacture, distribution and sale of gas to said defendant and to the inhabitants of said City of St. Cloud, as provided by the terms thereof. That said The Public Service Company of St. Cloud, Minn., did, in and by said ordinance, agree that for the said period of thirty years provided for

in and by the said contractual ordinance, it would furnish and supply fuel gas of the standard and quality named in the ordinance, at a rate of not exceeding One and 35/100 Dollars (\$1.35) per thousand cubic feet.

7. Alleges, that continuously from and after the date of the enactment of the said contractual Ordinance No. 160, and the approval thereof, on the 19th day of December, 1905, and until the date hereinafter stated, when said contractual ordinance No. 160 was taken over by the complainant herein, and all of its terms, agreements,

stipulations and contractual provisions were assumed by com-  
plainant as hereinafter stated. That said grantee of said ordi-  
nance did charge, collect and receive for its gas service  
throughout said period of time, and until the transfer to the com-  
plainant of said ordinance, the full maximum rate of One and 35/100  
Dollars (\$1.35) per thousand cubic feet, the full maximum rate pro-  
vided for in and by said ordinance, with the exception that for a time,  
a discount of ten cents per thousand cubic feet was accorded to the  
customers of the company for prompt settlement of bills. That  
said practice of discount was completely abandoned on or about  
March 1st, 1918, under the complainant's operation of said gas plant  
and works. That for fifteen years, the grantee in said ordinance  
charged, collected and received the maximum contract rate for fuel  
gas, amounting to One and 35/100 Dollars (\$1.35) per thousand  
cubic feet, from all users of gas within said City of St. Cloud.

8. Alleges, that no gas for illuminating purposes has been generated or sold under said ordinance by either the original grantee therein or complainant, to the inhabitants of the City of St. Cloud.

9. Alleges, that in the year 1915, the complainant, St. Cloud Public Service Company, was organized for the purpose of taking over, by proper assignments, conveyances and transfers, the gas and electric business of The Public Service Company of St. Cloud, Minn., and also the street railway system in the City of St. Cloud owned by the Granite City Railway Company, a subsidiary corporation. That, as this defendant is informed and believes, and charges the fact to be, in the month of August, 1915, the original grantee in said contractual ordinance No. 160, sold, assigned, transferred, set over and conveyed all of its property within the City of St. Cloud to

complainant above named, which sale, transfer and assign-  
37 ment included and had embodied therein the gas plant, works

and distribution system of said grantee in ordinance, together with all of the rights, privileges, contracts, property, interests and franchise privileges, owned and possessed by said grantee under said contractual Ordinance No. 160. That the executive officers of said complainant were, in the main, the same officers acting as executive officers for said The Public Service Company of St. Cloud, Minn., and that the stock interests of the stockholders of said St. Cloud Public Service Company were, in the main, the same stockholders holding stock in said The Public Service Company. That the same executive officers continued in charge of the affairs and business of the said St. Cloud Public Service Company,

and that the organization of said complainant company was largely for the purpose of financing the business and affairs of said enterprise, and enlarging and extending its field of operations, and enlarging the capacity of its plants and works within the City of St. Cloud.

10. Alleges, that for valuable considerations then and there passing and moving to said complainant from said The Public Service Company of St. Cloud, Minn., that the complainant did specifically undertake, assume and agree to perform all of the agreements, contracts, undertakings, or other forms of obligation of the said grantee in said ordinance, and that it, the said complainant, did assume, agree and undertake to perform, and did thereafter perform continuously, as hereinafter stated, all of the contracts, stipulations and agreements embodied in said contractual Ordinance No. 160.

(A) That said complainant did purchase said property, including said contractual Ordinance No. 160, from the said The Public Service Company of St. Cloud, Minn., the grantee of said ordinance

and the owner of said property, by a certain deed of conveyance, bearing date August 17th, 1915, made and executed

by The Public Service Company of St. Cloud, Minn., as grantor, to the St. Cloud Public Service Company, a corporation, the complainant above named, which said deed of conveyance, among other things, conveyed the company's property and distribution system, and did also convey, warrant, transfer, assign and set over to said complainant, and to its successors and assigns, among other real and personal property, the following:

"(3) All of the rights, powers, privileges, and benefits inuring or accruing by or through the following ordinances, viz:

(a) Ordinance Number 160 of the City of St. Cloud, Stearns County, Minnesota, approved December 19, 1905, granting to The Public Service Company of St. Cloud, Minn., and its assigns, certain rights relating to the maintenance and operation of electric and gas works in said City of St. Cloud."

That in and by said deed of conveyance there was further granted to the said complainant, under subdivision 4 of said deed of conveyance:

"All the rights, privileges, immunities and licenses of The Public Service Company of St. Cloud, Minn., over, in, upon, along, under, through or across the roads, streets, alleys, bridges, streams or waters and public places of the City of St. Cloud and vicinity, and all rents, issues, tolls, incomes and profits of said company arising from its said business or property, and all the good-will of its business, and all of its contracts with said City or with other corporations, or persons, and all rights and equities accrued or to accrue thereunder."

That said deed of conveyance was duly filed for record in the office of the Register of Deeds of Stearns County, Minnesota, wherein said

City of St. Cloud is situate, on August 18th, 1915, at six o'clock P. M., and was duly recorded therein in Book 131 of Deeds, on page 505.

That Exhibit "A" hereto attached and made a part of this Answer, is a true duly certified copy of said deed of conveyance.

39 (B) That the complainant above named did then and there obtain and secure unto itself large sums of money upon the security of said contractual Ordinance No. 160, together with other property belonging to it, under and by virtue of the terms and provisions of a certain trust deed or mortgage, securing an issue of bonds in the sum of Four Million Dollars, dated November 1st, 1914, and due November 1st, 1934, in said trust deed or mortgage fully described, and which said trust deed or mortgage was dated on the 18th day of August, 1915, and which said trust deed or mortgage was duly executed by the complainant above named, as grantor and mortgagor, to Chicago Savings Bank and Trust Company, a corporation organized under the laws of the State of Illinois, and Lucius Teter, as Trustees, and which said Trust deed or mortgage was duly filed for record in the office of the Register of Deeds of said Stearns County, Minnesota, wherein said City of St. Cloud is situate, on August 19th, 1915, at nine o'clock A. M., and recorded therein in Book 72 of Mortgages, on page 534.

That in and by the terms and provisions of said trust deed or mortgage, the complainant above named did convey and mortgage, in exact terms of description as set forth in said deed of conveyance above referred to, said contractual ordinance No. 160, and also, as set forth in subdivision No. 4 above stated, all of its contracts with said City of St. Cloud, or with other persons or corporations, and all rights and equities accrued or to accrue thereunder.

(C) That said complainant, on and after said purchase, did continuously occupy the streets, alleys, avenues and public places of the City of St. Cloud, with its distribution system, and did maintain and operate said gas plant, system of supply and distribution, continuously, until the date of the commencement of this action, and did continuously, with the exception of a short period of time when it gave and allowed a slight discount for prompt payment of 40 bills, charge, collect for and receive, from the inhabitants of the City of St. Cloud, the full maximum rate of One and 35/100 Dollars (\$1.35) per thousand cubic feet for its fuel gas.

(D) That complainant did at all times abide by and perform the provisions of said contractual Ordinance No. 160, relating to the manufacture, distribution and sale of gas, with considerable profits to it on account of its said gas service, from the said month of August, 1915, and prior thereto, until the date of the institution of this action.

(e) Defendant has been denied access to the corporate minute books and records of said complainant up to the date of the preparation of this answer, but it charges the fact to be, that the said complainant specifically, and in terms of specific contract resolution,

assumed the contractual features of said ordinance No. 160, and agreed to be bound by the terms thereof.

(F) That complainant has never renounced the terms, provisions or obligations of said contractual Ordinance No. 160, but has constantly engaged in the conduct of said business, and among other things, has received upon the benefits and security of said trust deed or mortgage, including said contractual ordinance No. 160, upon its bonds and securities issued thereunder, a sum in excess of Two million and ninety thousand Dollars.

(G) That said complainant had no right to act within the corporate limits of the City of St. Cloud with respect to its electric and gas service to the inhabitants thereof, except under the conditions of said contractual ordinance No. 160. That there was no other ordinance in existence covering plaintiff's said electric or gas service, and that full acceptance of the said conditions will be necessarily implied, based on the conduct of said complainant for more than five years, and based upon the acceptance by it of the privileges and fruits accorded and granted in and by said contractual ordinance.

41        11. Alleges, that the complainant ever since it succeeded to the rights of the original grantee in said contractual ordinance No. 160, has been, at the commencement of this action was, and is now, and will continue to be, bound by the terms of said contractual ordinance No. 160, with respect to the maximum price for fuel gas to be furnished and provided to the inhabitants of the City of St. Cloud, according to its terms. And in that behalf, the defendant further alleges, that even though said price for gas may be—which fact defendant denies—temporarily unprofitable to the complainant, that complainant, having accepted the fruits of said contractual ordinance No. 160, will not now in equity be heard to deny the existence of its bur' as. That complainant has never, prior to the summer of 1920, demanded, or in communications to the defendant, its council or commission, sought to secure      more than the maximum rate for fuel gas provided for in said contractual ordinance No. 160.

12. Alleges, that by reason of the facts af resaid, and the actions and conduct of complainant, and its predeece or in interest, covering a period of approximately twenty years, during which time complainant and its predecessor have operated under the terms of said contractual ordinance with respect to gas service, and during which time the said City of St. Cloud has never denied the right, and does not now deny the right of said complainant to receive said rate of One and 35/100 Dollars (\$1.35) per thousand cubic feet for fuel gas furnished and supplied by complainant, and by reason of all of the contracts, transactions, sales, assumptions, and other matters hereinbefore more fully stated, the complainant is estopped from seeking or demanding, in equity, or otherwise, any higher rate for fuel gas service than the contractual rate of One and 35/100 Dollars (\$1.35) per thousand cubic feet.

42      13. Alleges, that by reason of the facts aforesaid, and based on the legislative delegated authority given to and possessed by the defendant and its Common Council at the time of the passage and approval of said ordinance, there is no confiscation or attempted confiscation without due process of law, of the property of the complainant, either in violation of the provisions of the Constitution of the United States, the Constitution of the State of Minnesota, or otherwise, and that there is entire want of equity in the Bill of Complaint of complainant, as the same was by complainant amended. That for said reason, the defendant maintains and alleges, that said Court, as a matter of law, is without jurisdiction to proceed in this action. Furthermore, defendant maintains and alleges, that by reason of the binding force of said contractual ordinance No. 160, and by reason of the existence between the City of St. Cloud and the said complainant above named, of the contract relations above stated, that no Federal question is involved in this action, and this Court is without jurisdiction to proceed.

14. Defendant further alleges, that under the provisions of Section 17 of Chapter 14 of the Special Laws of Minnesota for 1889, which statutory enactment was in full force and effect at the time and previous to the time of the passage of said contractual ordinance No. 160, it was provided as follows:

"See. 17. The place of trial of all actions or proceedings by or against the City of St. Cloud not brought before a city justice shall be in the County of Stearns. All suits or proceedings by or against said city, not brought before a city justice, shall be brought in the District Court of said Stearns County; and no other court whatever shall have original jurisdiction thereof. Provided, that this section shall not prevent the bringing of any proceeding in the Supreme Court of the state in which said Supreme Court may have original jurisdiction."

43      That at the time of the adoption of the Home Rule Charter of the City of St. Cloud, on November 28th, 1911, its said Home Rule Charter, Section 275 thereof, contained, and ever since has, and now contains, in exact terms as above quoted, the same provisions with respect to the venue of causes against the defendant City of St. Cloud. That at all times since the enactment and approval by the City of St. Cloud and its constituted authorities and the acceptance and assumption of the terms of said contractual Ordinance No. 160, both by complainant and its predecessor, the law covering the venue of causes against the City of St. Cloud protected the said City of St. Cloud in respect to the venue and place of trial of causes against it, and if valid in law, this Court is without jurisdiction. And in that behalf, defendant further alleges, that in the absence of any allegation or showing in plaintiff's Amended Bill of Complaint, that the defendant has violated or contemplates or threatens the violation of any of the protective provisions of the Constitution of the United States with respect to the confiscation of property, that no Federal question is involved in this action. And in that be-

half, defendant further alleges, that in addition to the absence of any Federal question in this suit, the venue provisions of the legislative act and Home Rule Charter aforesaid legally confine the complainant to the State courts of general jurisdiction of the State of Minnesota, and the said County of Stearns. In that behalf, defendant further alleges, that both complainant and its predecessor in interest had actual notice and knowledge of the terms and provisions of said legislative enactments and Home Rule Charter at the time it contracted and entered into the assumption of contract relations with the City of St. Cloud, and that it agreed, as a matter of law, to the restrictions upon venue and place of trial embodied in said statute and in said Charter.

44        15. Further answering the Bill of Complaint, the defendant denies each and every allegation, matter, statement and thing in said Amended Bill of Complaint, as well as in the original Bill of Complaint, alleged or pleaded, and each and every part and portion of each and all of such allegations, except as may be in this answer specifically admitted or otherwise denied.

16. Further answering, defendant alleges, on information and belief, that the actual value of the gas property and distribution system employed in the manufacture, distribution and sale of gas within the City of St. Cloud, including a reasonable allowance for working capital, is not in excess of One hundred fifty thousand Dollars. That the rate sought by the complainant in this cause, of Three and 39/100 Dollars (\$3.39) per thousand cubic feet for fuel gas, is unreasonable, unfair, highly exorbitant, and excessive. That, according to the information and belief of defendant, at the time of the commencement of this action, the reasonable net holder cost per thousand cubic feet of fuel gas, together with the reasonable cost for operation, including leakage, distribution, commercial, new business and general expense, depreciation, taxes, and unclassified expense and fair return on the fair value of the property was and is not to exceed One and 60/100 Dollars (\$1.60) per thousand cubic feet of gas. That in fact, the cost and outlay for coal, coke, oil, and other costs and charges for materials entering into the manufacture and production of fuel gas, are declining, and available supplies of the raw materials necessarily entering into the manufacture and production of fuel gas, were, at the time of the commencement of this action, and are, available, and will continue to be available, for far less than the expense therefor and cost thereof set up and contained in the bill of complaint and the amended bill in this action. That complainant has derived a profit during years of service from the

45        operation of said gas plant, and with the reduction of costs, not only of raw materials, but, as defendant is informed and believes, of labor, after the elimination of temporary conditions, it will continue to derive profits from the operation of said business. In that behalf defendant alleges, that it has applied to the complainant and its executive officers for the right and privilege to inspect the books, records and papers of the complainant pertaining to its gas service, and the records covering the costs of

its gas service and business, but that while certain information, incomplete and fragmentary, has been accorded, that vital records have been missing and have not been produced. That supporting vouchers called for by the Valuation Engineer and Auditors of the defendant have not been furnished, but have been suppressed; that the minute books showing the transfer of the gas properties to the complainant have been withheld, and that opportunity upon the part of defendant and its representatives with respect to the gaining of information so as to more fully set forth the actual facts with respect to the actual cost of manufacture and sale of gas, has been obstructed and denied.

Wherefore, Defendant prays that complainant's Bill of Complaint, as amended, be dismissed, and that the complainant herein take and recover nothing in this action, that the defendant have such other relief as may be proper in the premises disclosed, and that it be awarded by this Honorable Court its costs. And the defendant herein will ever pray, etc.

CITY OF ST. CLOUD,  
*A Municipal Corporation,*  
By W. W. MATSON,  
*Its Mayor;*  
JULIUS ADAMS,  
HENRY MAYBURY,  
*Commissioners,*

*Constituting the City Commission of the City of St. Cloud.*

R. B. BROWER,  
St. Cloud, Minnesota,  
*Solicitor for Defendant and City Attorney.*

## EXHIBIT "A."

112,433.

*Deed.*

The Public Service Company of St. Cloud, Minn.,

to

St. Cloud Public Service Company.

This indenture, made this 17th day of August A. D. 1915, by and between The Public Service Company of St. Cloud, Minn., a corporation duly organized and existing under the laws of the State of Minnesota, and having its principal office in the City of St. Cloud in the County of Stearns, in said State, party of the first part, and St. Cloud Public Service Company, also a corporation duly organized and existing under the laws of the State of Minnesota, and having its principal office in said City of St. Cloud, party of the second part.

Witnesseth: That the party of the first part, in consideration of the sum of Ten Dollars and other valuable considerations by it received, does hereby convey, warrant, transfer, assign and set over to the party of the second part, and to its successors and assigns, forever, all the following real and personal property, towit:

1. All the following described property situated in the City of St. Cloud, in the County of Stearns, in the State of Minnesota, towit:

(a) Lots nine (9) and ten (10) in Block (4) in the Town, now City of St. Cloud, according to the plat and survey thereof made by John L. Wilson, on file and of record in the office of the Register of Deeds in and for Stearns County.

(b) Lot two (2), of the St. Cloud Water Power and Mill Company's Mill Sites, according to the plat and survey thereof on file and of record in the office of the Register of Deeds in and for Stearns County, Minnesota; also commencing at the northwesterly corner of said lot two (2), of St. Cloud Water Power and Mill Company's Mill Sites, thence running westerly to the northeasterly corner of lot five (5) of said Mill Sites, thence running southerly and along the easterly line of said lot five (5), one hundred and fifteen (115), feet to a point five (5) feet northerly from the southeasterly corner thereof, thence easterly to the southwesterly corner of said lot two (2), thence northerly along the westerly line of said lot two (2), to the place of beginning; said premises being a part of lot three (3) of section thirteen (13), in township one hundred and twenty-four (124) north, range twenty-eight (28) west.

(c) All buildings and improvements on the above described premises, and the machinery, retorts, tanks, reservoirs, engines, boilers, condensers, pumps, pipes, connections, dynamos, fixtures, tools and appliances formerly constituting the gas plant and the electric light plant, of the Public Service Company of St. Cloud, Minn., together with street arc circuits and the wires and poles for same, and service connections, are lamps, incandescent circuits, meters, and other appliances and appurtenances for the electric light business, and the condensers, expansion tanks, pipes and pipe lines, and all necessary connections for the operation of said gas system, and equipment of every name and kind.

2. All estates, water power, rights in real estate or water power and other rights and privileges, held, derived or enjoyed under the following described leases, agreements, or instruments now of record in the office of the Register of Deeds in and for Stearns County, in the State of Minnesota, viz:

(a) A lease from St. Cloud Wapter Power and Mill Company dated January 1, 1889, filed in said Register's office February 6, 1889, and recorded in book 68 of deeds, at page 234, granting to St. Cloud Gas and Electrie Company two and two thirds (2 2/3) mill powers of water power, together with the title to part of the real estate hereinabove described.

47 (b) A lease from St. Cloud Water Power and Mill Company dated November 1, 1891, filed in said Register's office September 29, 1897, and recorded in book 91 of deeds, at page 540, granting to St. Cloud Gas and Electric Company two and two thirds (2-2/3) mill powers of water power.

(c) A lease from St. Cloud Water Power Company dated November 30, 1900 filed in said Register's office December 12, 1900, and recorded in book 108 of deeds at page 321 (and again filed in said office November 22, 1901 and recorded in Book Q of Miscellaneous records, at page 416), granting to Charles S. Benson, Receiver, two and two thirds (2-2/3) mill powers of said water power, together with the title to part of the real estate hereinabove described.

(d) A lease from St. Cloud Water Power Company dated December 9, 1907, filed in said Register's office June 27, 1908, and recorded in Book K of assignments and agreements, at page 230, granting to The Public Service Company of St. Cloud, Minn., by the name "Public Service Company" two and two thirds (2-2/3) mill powers of said water power.

(e) A lease from St. Cloud Water Power Company dated April 1, 1911, filed in said Register's office April 24, 1911, and recorded in Book O of assignments and agreements, at page 329, granting to The Public Service Company of St. Cloud, Minn., for a term of ninety-nine (99) years, twenty (20) mill powers of said water power.

(3) All the rights, powers, privileges, and benefits inuring or accruing by or through the following ordinances, viz:

(a) Ordinance Number 160 of the City of St. Cloud, Stearns County, Minnesota, approved December 19, 1905, granting to The Public Service Company of St. Cloud, Minn., and its assigns certain rights relating to the maintenance and operation of electric and gas works in said City of St. Cloud.

(b) Ordinance numbered 21 of the Village of Sauk Rapids, Benton County, Minnesota, adopted February 16, 1901, granting to the Light, Heat, Transit and Public Service Company, and its assigns, certain rights in said Village relating to the distribution of electricity.

(4) All the rights, privileges, immunities and licenses of The Public Service Company of St. Cloud, Minn., over, in, upon, along, under, through or across the road, streets, alleys, bridges, streams or waters and public places of the City of St. Cloud, and vicinity, and all rents, issues tolls incomes, and profits of the said Company arising from its said business or property and all the good-will of its business, and all of its contracts with said City or with other corporations, or persons, and all rights and equities accrued or to accrue thereunder.

(5) All other real and personal property of every kind and description owned by The Public Service Company of St. Cloud, Minn., at the date of this indenture.

In witness whereof, the party of the first part has caused these presents to be signed in its corporate name by its President, and to be sealed with its corporate seal, attested by its Assistant Secretary, the day and year first above written.

[Corporate Seal of The Public Service Company of St. Cloud, Minn.]

THE PUBLIC SERVICE COMPANY OF  
ST. CLOUD, MINN.,  
By A. G. WHITNEY,  
*President.*

Attest:

A. D. MCKENZIE,  
*Assistant Secretary.*

In Presence of:

WHEELOCK WHITNEY,  
G. W. PLANK,  
*Witnesses.*

48 STATE OF MINNESOTA,  
*County of Stearns, ss:*

Be it known that on this 17th day of August, A. D. 1915, before the undersigned, a notary public, within and for said County, personally appeared A. G. Whitney, and A. D. McKenzie, to me well known; and the said A. G. Whitney, being by me duly sworn did say that he is the duly elected, qualified, and acting President, of The Public Service Company of St. Cloud, Minn., a corporation, the party described in and who executed the foregoing instrument, and the said A. D. McKenzie being by me first duly sworn, did say that he is the duly elected, qualified, and acting Assistant Secretary of The Public Service Company of St. Cloud, Minn., aforesaid, and they both did say that the seal affixed to said instrument iss the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors and said A. G. Whitney and A. D. McKenzie acknowledged said instrument to be the free act and deed of The Public Service Company, of St. Cloud, Minn., a corporation, aforesaid.

[Notarial Seal, Stearns Co., Minn.]

GEORGE KELLEY,  
*Notary Public, Stearns County, Minnesota.*

My commission expires June 15, 1916.

(Internal Revenue Stamp affixed and canceled, \$40.00.)

Filed for record on the 18th day of August A. D. 1915, at 6 o'clock P. M.

JOHN LANG,  
*Register of Deeds.*

I hereby certify that taxes for the year 1914 on the lands described within are paid.

CHRIS SCHMITT,  
*County Treasurer.*  
K.,  
*Dep.*

Taxes paid — — —, — — —, transfer entered this 18th day of Aug.  
1915.

NICHOLAS THOMEY,  
*County Auditor,*  
By L. C. DUEBER,  
*Dep.*

Office of Register of Deeds,  
Stearns County, Minn.

I hereby Certify, that the within and foregoing is a true and correct transcript from the original records in this office of a Deed from Public Service Company of St. Cloud, Minn., to St. Cloud Public Service Company filed for record on the 18th day of August A. D. 1915, at 6 o'clock P. M., and recorded in Book 131 of Deeds on page 505 and that I have compared the same with said original record.

Witness my hand — official seal at St. Cloud, in said county, this  
28 day of Dec. A. D. 1920.

[SEAL.]

JOHN LANG,  
*Register of Deeds.*

49      United States District Court, District of Minnesota, Sixth  
Division.

ST. CLOUD PUBLIC SERVICE COMPANY, Complainant,  
vs.

CITY OF ST. CLOUD, Defendant.

*Affidavit.*

STATE OF MINNESOTA,  
*County of Stearns, ss:*

W. W. Matson, Julius Adams and Henry Maybury, being first duly sworn on oath, depose and say, that they are, respectively, the Mayor and Commissioners of the City of St. Cloud, a municipal corporation, defendant within and above named; that they have read the foregoing Answer and know the contents thereof, and that the statements and allegations therein contained are true of their own knowledge, except where made on information and belief.

Further affiants say not, except that they make this affidavit of verification in order that the same may be used as an affidavit in

support of a motion or an order to show cause for a dismissal of the above entitled action, or such other relief as said Court may direct and grant.

W. W. MATSON,  
JULIUS ADAMS,  
HENRY MAYBURY,

Subscribed and sworn to before me this 28th day of December, 1920.

[SEAL.]

MARIE THILL,  
*Notary Public, Stearns County, Minn.*

My Commission expires June 25, 1922.

Filed in U. S. District Court December 29, 1920.

50      United States District Court, District of Minnesota, Sixth Division.

ST. CLOUD PUBLIC SERVICE COMPANY, Complainant,  
vs.

CITY OF ST. CLOUD, Defendant.

*Affidavit of A. G. Whitney.*

STATE OF MINNESOTA,  
*County of Hennepin, ss:*

A. G. Whitney, being first duly sworn on his oath says that ever since its organization he has been and still is the President of complainant and has resided and still resides in the defendant City. That he has been the executive officer of complainant in charge of his entire business since its organization, including the operation of its gas plant.

Deponent further says that all of the complainant's books of account have been kept under his general jurisdiction and control and he has always kept himself advised as to all entries made therein and knows that the same are in every respect true and correct and contain a true and correct recital of all of complainant's business affairs and operation.

Deponent further says that on or about the 23d day of October, 1920, he furnished to A. J. Luick in the office of William A. Baehr, Consulting Engineer, in the City of Chicago, written data and statistics taken from complainant's books with respect to complainant's gas property in defendant City, and its operations, such data consisting of the following:

- (1) Statement of earnings and expenses for the years of 1907, 1908, 1909, 1910, 1911, 1912, 1913, 1914, 1915, 1916, 1917, 51      1918, 1919 and the first eight months of the year 1920.

- (2) Statement of earnings and expenses by months from January 1, 1919, to September 30, 1920, both inclusive.
- (3) Statement of materials and supplies on hand from September 30, 1918, to September 30, 1920, both inclusive.
- (4) Statement of coal, oil and coke on hand at the end of each month from September 30, 1918, to August 31, 1920.
- (5) Balance sheet of the St. Cloud Public Service Company as at August 31, 1920.
- (6) Balance sheet showing assets and liabilities of the gas department separated from the general balance sheet of complainant as at August 31, 1920.
- (7) Original cost of the gas property and plant as at August 31, 1920.
- (8) Operating results and efficiencies by years from January 1, 1915 down to and including the nine months ending September 30, 1920.
- (9) Average cost of coal, coke and oil from September 30, 1918 to August 31, 1920.
- (10) Average selling price of residuals by years from January 1, 1914 to September 30, 1920.
- (11) Study of labor costs by years from January 1, 1915 to October 31, 1920.
- (12) Gas sales, gas made and gas unaccounted for from January 1, 1915 to August 31, 1920.
- (13) Number of gas meters in service September 30, 1910 to September 30, 1920.
- 52 (14) Population statistics of St. Cloud from the year 1900 to the year 1920.
- (15) Method used in proportioning expenses between the electric department and the gas department.
- (16) Actual purchase price of gas meters showing invoice price, freight charges and size of meters from January 1, 1917 to September 30, 1920.
- (17) Sundry purchases of cast iron and steel pipe from January 1, 1918 to September 30, 1920.

Deponent further says that all of said statistics so furnished to the said Luiek were taken from the books and accounts of complainant and that each and every part thereof is true and correct.

Deponent further says that complainant is the owner of all those lands and premises lying and being in the City of St. Cloud, County of Stearns and State of Minnesota, described as follows, to-wit: Lots numbered nine (9) and ten (10) in Block four (4) in the Town of

St. Cloud (Wilson's survey). That on said lands and premises are located and situated the buildings and structures, equipment and machinery constituting the gas manufacturing plant of the complainant.

Deponent further says that said lands and premises are particularly well located for said gas manufacturing purposes, being situate on the main line of the Great Northern Railway Company, and that the complainant owns its own side track connecting with said main line, which said side track is located upon said lands and premises.

Deponent further says that he has been a resident of the City of St. Cloud for more than thirty years; that he has always been a large holder and owner of real estate therein and has always been 53 advised as to the value of all real properties in said City, including the value of the premises hereinbefore described. That he knows of his own knowledge that the lands and premises hereinbefore described, to-wit: Lots numbered nine (9) and ten (10), in Block four (4), in the Town of St. Cloud (Wilson's survey) are now reasonably worth and of the fair market value of Twenty-five thousand dollars (\$25,000).

A. G. WHITNEY.

Subscribed and sworn to before me this 16th day of November, 1920.

[Notarial Seal.]

SARA H. CLOUGH,

*Notary Public, County of Hennepin,*

*State of Minnesota.*

My commission expires Mar. 20, 1924.

Filed in U. S. District Court November 20, 1920.

54      United States District Court, District of Minnesota, Sixth Division.

ST. CLOUD PUBLIC SERVICE COMPANY, Complainant,

vs.

CITY OF ST. CLOUD, Defendant.

*Affidavit of George F. Grote.*

STATE OF MINNESOTA,  
*County of Hennepin, ss:*

George F. Grote being first duly sworn on his oath says:

That he is a resident of the City of Chicago in the State of Illinois. That he received his education in mechanical engineering at Lewis Institute, Chicago, Illinois. After leaving school he was employed in the accounting department of the Chicago and Northwestern Railroad, off and on, for about five years, the intervening periods being spent in technical studies. That in the early part of 1910 he entered the employ of the Peoples Gas Light & Coke Company, to assist in making a detailed inventory and valuation of its

property in the City of Chicago. That after this work was completed—approximately the latter part of 1910—he entered the employ of William A. Baehr, a consulting engineer of Chicago, Illinois, as chief draftsman and inventory field superintendent. That during the time he spent in the drafting department he laid out and designed improvements and extensions of gas properties for many gas companies, including, among others, properties owned by the 55 Public Service Company of Northern Illinois and the Illinois Northern Utilities Company. That he has also done some hydraulic engineering work for Mr. Baehr in connection with the property of the Green Bay and Mississippi Canal Company. That as field superintendent for Mr. Baehr he has been employed on the following inventories and valuations of utility properties:

Name of company.	Location.	Kind of utility.
The Peoples Gas Light & Coke Co.	Chicago, Ill....	Gas.
The Oshkosh Gas Light Co...	Oshkosh, Wis...	Gas & Electricity.
The Antigo Electric Co.....	Antigo, Wis....	Electricity.
The St. Charles Lighting Co..	St. Charles, Mo.,	Gas.
Greeley Gas Light & Fuel Co.	Greeley, Colo...	Gas.
Public Service Co. of Northern Illinois	All cities served.	Gas.
Northwestern Gas Light & Coke Co.	Oak Park, Ill...	Gas.
Canton Gas & Electric Co.....	Canton, Ill....	Gas, Electricity & Heating.
Lewiston Electric Company..	Lewiston, Ill....	Electricity.
Central Indiana Gas Light Co.	All cities served.	Gas.
Indiana Gas Light Company.	All cities served.	Gas.
Iowa Railway & Light Co....	Marshalltown,	
	Iowa .....	Gas.
Sheldon Light & Power Co...	Sheldon, Iowa..	Electricity.
Mexico Light & Power Co....	Mexico, Mo....	Gas, Electricity & Heating.
Washington Gas & Electric Co.	Washington,	
	C. H., O....	Electricity & Gas.
Belt Gas Company.....	Deadwood &	
	Lead, S. D...	Gas.
Southern Counties Gas Co....	Los Angeles,	
	Calif. ....	Gas.
Northern Indiana Gas Light Co.....	Kendallville,	
	Indiana .....	Gas.
Kings County Lighting Co...	Brooklyn, N. Y.	Gas.
Minneapolis Gas Light Co....	Minneapolis,	
	Minnesota ..	Gas.
Wisconsin-Minnesota Light & Power Co. ....	All cities served.	Gas.
Albion Gas Light Co. and various other small properties.	Albion, Mich...	Gas.

That he has also assisted in the operation of such utility companies as  
are operated by Mr. Baehr, as President of the North Amer-  
56 ican Light & Power Company, and also of such properties for  
which he acts as consulting engineer. That during the last  
part of the war he was attached to the Chemical Warfare Service as  
assistant Gas Defense Instructor at the Divisional Gas School at Camp  
Dodge, Iowa.

Deponent further says that on or about the 11th day of December,  
1918, he went back to the office of said William A. Baehr in the City  
of Chicago and has been there continuously since that time engaged  
in inventory and valuation work of public utilities, such as the above  
named complainant, in a supervisory capacity.

Deponent further say that under the supervision of A. J. Luick,  
in charge of the valuation and rate work of said William A. Baehr, he  
made an inventory of the physical property used and employed by  
the above named complainant in the manufacture, sale and distribution  
of gas in the City of St. Cloud. That the organization in the  
making of said inventory consisted of affiant, as Field Superin-  
tendent, and two engineering assistants from the office of said Baehr.  
That the field work was started on September 13, 1920 and was com-  
pleted on the 12th day of October, 1920. That affiant's said two as-  
sistants were experienced and skilled in said line of work and that  
they at all time during the taking of said inventory worked under  
affiant's direction and supervision; and that he personally checked  
all the work which they did in order to satisfy himself as to its  
accuracy.

Deponent further says that this inventory was made in great de-  
tail and that all of the data and facts connected therewith  
57 were gathered carefully and with great accuracy. That as to  
the land upon which the gas manufacturing plant of the com-  
plainant is located he referred to the real estate records in complainant's  
office and used the description of the property as shown there.  
That said land as shown by complainant's records was situated in  
the City of St. Cloud and is described as follows, to-wit: Lots number-  
nine (9) and ten (10) in Block (4) in the Town of St. Cloud (Wil-  
son's Survey) according to the plat thereof on file and of record in  
the office of the Register of Deeds of Stearns County, Minnesota.  
That the size of said lots is 66 ft. x 132 ft.; that the total area of said  
lots is 17,424 square feet; that the area actually occupied by the  
complainant for its gas manufacturing plant is 10,537 square feet.

Deponent further says that he was advised while in St. Cloud that  
the total value of said Lots nine (9) and ten (10), exclusive of build-  
ings and improvements thereon, was the sum of \$25,000; and that  
based upon the proportion of said land actually covered by the gas  
manufacturing plant the value of such land so covered would be  
the sum of \$15,118. The last mentioned figure, for the purposes of  
valuation, does not include the usual overhead charges.

Deponent further says that the inventory of the buildings em-  
ployed and devoted to the said manufacture of gas was prepared  
with the greatest care. All measurements were taken in great detail,  
steel tapes were used on all measurements where it was practicable

58 and the smaller measurements were taken by means of standard zigzag rules. That all long measurements were taken on the nearest inch and short measurements on the nearest half inch. That the quantities of excavation were indicated by cubic yards; that the quantities of brick work were shown in cubic feet; that the quantities of flooring, roofing and millwork were shown in square feet; and that the quantities of lumber were shown in board feet; that all other materials used in the construction of said buildings were listed in detail and the quantities shown are as those used in standard practice. That the depth and character of the foundations were obtained by digging test holes at various points on the inside and outside of the buildings.

Deponent further says that all of the equipment contained in said manufacturing plant were listed by him and his assistants in standard dimensions as used by manufacturers in identifying the identical piece of equipment and in specifying the sizes and type, that as to such equipment as might have been installed by complainant or which would not have been furnished by a manufacturer as a completed unit, accurate and sufficient details were taken as to the kinds of material used and the dimensions shown so that an accurate and intelligent estimate could be made of their cost.

Deponent further says that all pipe, fittings and sundries used and employed in said manufacturing plant were listed in detail according to size, kind and class of service; and that the wiring in said plant has been listed according to size and as to classification between light and power; and that the wiring accessories, such as conduits, conduit fittings and miscellaneous accessories have been listed according to standard practice.

59 Deponent further says that the inventory of the gas mains was made from the records in the complainant's office after a consultation with the superintendent and other persons having supervision of the gas plant and distribution system at the time of its installation. That affiant believes that the information so received from said records is in every respect correct and accurate. That it is impossible to make an actual check of the mains as they are under ground and because of the numerous expenses involved in so doing, but in this particular instance in order to check the size and kinds of main test holes were dug for that purpose in different portions of the defendant City. That the number and size of services were obtained partially from records in complainant's office and also through actual field work.

Deponent further says that the meters were listed by sizes and makes from the actual purchases dating from the installation of the plant and by reference to the complainant's office records it was possible to determine, and affiant did determine, the number of meters destroyed and condemned; that by deducting these from the total meters purchased the total number of meters owned by the Company was ascertained; that the number of meters in use as of October 1, 1920, was obtained by deducting the meters in stock as of that date from the net meters owned by complainant.

60 Deponent further says that all of the furniture and fixtures in the complainant's main office were listed in detail. That because of the fact that the business of complainant, electric, street railway and gas department are consolidated in one main office it was necessary that the office furniture and fixtures be listed as an entirety and they have been apportioned between the several departments by affiant as follows:

Electric	Department.....	60%
Street Railway	" .....	20%
Gas	" .....	20%

and that affiant believes such apportionment to be fair and reasonable between said respective departments.

Deponent further says that after the inventory had been made by him and his assistants as aforesaid he returned to his office in the City of Chicago where the work of computing the various quantities has been done.

Deponent further says that after the inventory was completed he made a study of the accrued depreciation of the physical property of the complainant actually used and employed by it in the manufacture, sale and distribution of its gas and that he did arrive at said accrued depreciation and that in so doing he considered and took into account all of the elements of such depreciation, including age, probable life, physical wear and tear, deferred maintenance, inadequacy, supersession and obsolescence.

61 Deponent further says that he was able to carefully inspect the plant buildings, the equipment, piping, wiring, tools, furniture and fixtures therein contained and also the furniture and fixtures at the main office, and the utility equipment such as automobile trucks, and that after such inspection and after taking into consideration and account all of the elements aforesaid he arrived at the "condition per cent" which he assigned to each item.

Deponent further says that he found the "condition per cent" of the said several classifications to be as follows:

Land .....	100%
Transmission and distribution.....	94%
Buildings and Miscellaneous structures.....	89%
Plant equipment.....	88%
General equipment.....	82%

Deponent further says that it was impracticable to inspect all mains and services because of the fact that they are underground and that as to these items he determined the "condition per cent" upon his general judgment and experience with respect to depreciation on such items, giving particular consideration to the soil conditions which he tested and examined in said City where such mains and services were located. That his determination as to the "condition per cent" of said mains was based also on what he found in the various test holes which he made as hereinbefore set forth. That in determining the "condition per cent" of such mains he also took

into consideration their probable age and average expectation of life.

Deponent further says that in general terms complainant's gas plant is what is known as a combination coal and water gas plant, having a coal gasworking capacity of 100,000 cubic feet and a water gas capacity of approximately 215,000 cubic feet of gas per 62 24 hour day. That the coal gas equipment consists of two benches of half depth sizes and the water gas of one 5 ft. Gas Machinery Company, water gas machine. That in addition thereto there is the necessary auxiliary equipment such as exhausters, scrubber, condensers, tar extractor, wash box and purifiers. That the boiler capacity consists of two boilers of a total of about 380 h. p. which furnishes steam to the plant auxiliaries and for heating purposes. That the total gas holder capacity is 60,000 cubic feet and is divided into one 10,000 cubic feet relief holder and one 50,000 cubic feet commercial holder. That the distribution system consists of 13.1 miles of cast iron mains and 7.3 miles of steel mains, both of varying sizes. That there are 1,247 house services and 67 curb services in sizes varying from 1 inch to 2 inches.

Deponent further says that after he had determined the quantities computed from the various items of said inventory in Chicago he turned over his findings and determination as to such quantities, together with his inventory to A. J. Luick in order that said Luick might determine and fix the unit prices to be placed upon each item in said inventory.

GEO. F. GROTTÉ.

Subscribed and sworn to before me this 16th day of November, 1920.

SARA H. CLOUGH, [Notarial Seal.]  
*Notary Public, County of Hennepin, Minnesota.*

My commission expires Mar. 20, 1924.

Filed in U. S. District Court November 20, 1920.

63 United States District Court, District of Minnesota, Sixth Division.

ST. CLOUD PUBLIC SERVICE COMPANY, Complainant,  
vs.

CITY OF ST. CLOUD, Defendant.

*Affidavit of A. J. Luick.*

STATE OF MINNESOTA,  
*County of Hennepin, ss:*

A. J. Luick being first duly sworn on his oath says:

That he is a resident of the City of Chicago in the State of Illinois. That he was graduated from the Mechanical Engineering Course of the University of Wisconsin in June, 1907. That im-

mediately after graduating he entered the employ of the Laclede Gas Light Company of St. Louis, Missouri, as Cadet Engineer. That while with the Laclede Gas Light Company he was successively in charge of the Boiler and Engine Rooms, Coal Gas Operation and Water Gas Operation, and assisted in such construction and repair work as was done at the plant. That in February, 1909, he was given leave of absence to assist in the valuation of the Water, Gas and Electric Departments of the Beloit Water, Gas & Electric Company. That after the completion of this work about May 1, 1909, he left the employ of the Laclede Gas Light Company and entered the employ of the Peoples Gas Light & Coke Company of Chicago, to make an inventory and valuation of the properties of that company in the City of Chicago. That shortly after completing

64 this work, about March, 1911, he entered the employ of William A. Baehr, a Consulting Engineer of Chicago, Illinois, to take charge of the Valuation and Rate Work in his office. That since he has been in this line of work he has made inventories and appraisals of Public Utility Properties of a total value of more than Two hundred and fifty million dollars (\$250,000,000.00), including valuations of the Peoples Gas Light & Coke Company of Chicago, the Kings County Lighting Company, Brooklyn, the Gas and Electric Departments of the Oshkosh Gas Light Company, the Minneapolis Gas Company, the Omaha Gas Company, the Electric, Gas, Heating and Street Railway Departments of the Georgia Railway and Electric Company of Atlanta, Georgia, and many others.

Deponent further says that as assistant to Mr. Baehr he has also had a great deal of such other work as is customarily done in a Consulting Engineer's office. This comprises the making of so-called Bankers' Reports for the purpose of issuing of securities, reports for the purpose of purchasing properties, the designing and construction of utility plants, as well as extensions to such plants, and the purchasing of materials and equipment for plants of this character. That he has also assisted in the operation of such Utility Companies as are owned and operated by the North American Light & Power Company, of which Mr. Baehr is Vice-President and General Manager, as well as of such Companies which Mr. Baehr represents as Consulting Engineer. Among these companies are the following:

The Washington Gas & Electric Co. Washington C. H., Ohio.  
Moberly Light & Power Company, Moberly, Missouri.

65 Adair County Light, Power & Ice Co., Kirksville, Missouri.  
Boonville Light, Heat & Power Co., Boonville, Mo.

Consumers Light & Power Co. of Oklahoma, operating in Ardmore, Durant, Waurika and numerous smaller communities.

Shawnee Gas & Electric Company, Shawnee, Okla.

Oklahoma Light & Power Company, Ada, Oklahoma.

Oklahoma Power & Transmission Co., Ada, Oklahoma.

Great Falls Gas Company, Great Falls, Mont.

Greeley Gas & Fuel Company, Greeley, Colo.

Southern Illinois Light & Power Co., St. Louis, Mo., serving Hillsboro, Collinsville, Duquoin, Litchfield, Mt. Vernon and some thirty or forty smaller communities in Southern Illinois.

Deponent further says that he has been in direct charge of all the Rate Proceedings of the North American Light & Power Company and has represented this Company in many proceedings before the Missouri, Oklahoma, and Idaho Public Service Commissions.

That he has also represented numerous companies beside the above mentioned, in Valuation Proceedings and Rate Hearings. Among the number might be mentioned the Winnipeg Electric Railway Company of Winnipeg, Canada, the Billings Gas Company of Billings, Montana, the Iowa Railway & Light Company of Marshalltown, Iowa, the Canton Gas & Electric Company of Canton, Illinois, the City of Iowa City, Iowa, the Delphos Gas Company of Delphos, Ohio, the Fort-Smith Light and Traction Company of Fort-Smith, Arkansas, the South Western General Gas Company of Fort-Smith, Arkansas, the Wisconsin-Minnesota Light & Power Company at La Crosse, Eau Claire and Chippewa Falls, Wis. and Winona, Minn. and many others.

66 Deponent further says that while in the office of William A. Baehr has assisted in doing work for public authorities as follows: For the City of New York, The Brooklyn Union Gas Case, involving tax matters; for the Public Service Commission of New York for the First District, in the matter of a pressure survey and report covering the Island of Manhattan; for the City of Middle-town, Ohio, the designing and installing of street lighting system; for the City of Winnetka, Illinois, in the matter of operating conditions of the North Shore Gas Company and for the City of Iowa City, a valuation and rate report as before mentioned.

Deponent further says that he has read the affidavit of A. G. Whitney herein and knows the contents thereof and that the said Whitney did on or about the date stated in his affidavit furnish to affiant the data and statistics in his said affidavit referred to. That said data and statistics are very full and complete and disclose the operations of complainant so far as its gas property is concerned from January 1, 1907 to August 31, 1920, both inclusive.

Deponent further says that he has read the affidavit of George F. Grote herein and knows the contents thereof. That said Grote was directed by affiant to make the inventory and to compute the quantities of each item listed therein and to determine the accrued depreciation referred to in his affidavit. That upon the said

67 Grote's return to the City of Chicago after completing said inventory he did turn over to affiant said inventory and the quantities of each item therein computed therefrom so that affiant might find and determine and apply the unit costs to each item listed in said inventory.

Deponent further says that he has made a reproduction cost estimate of the property of the complainant employed and used by it in the manufacture, sale and distribution of its gas in the City of St. Cloud as shown by said inventory and the quantities found by said Grote and the facts stated in the affidavit of said Whitney, such reproduction cost estimate being as of the 1st day of October, 1920, applying and using prices current as of that date.

Deponent further says that in arriving at his reproduction cost

of the physical property he used unit costs based, among other things, on his own judgment and experience. That through the office of said Baehr there have been continuously purchased for many years building materials, equipment, pipe, meters and other materials such as are used in the construction of gas, electric and other utility properties, such purchases being made in large quantities each year. That for many years there have also been made in the office of said Baehr price investigations for valuation work and that as a result thereof valuable and detailed price information has been available at all times.

Deponent further says that in arriving at the reproduction cost of said property he has taken into account the depreciation of said

property as fixed by said Grote and as set forth by him in his  
68 said affidavit. That he personally has made an examination of the plant of complainant used and employed in the gas business and has examined the same with a view of determining its accrued depreciation, and from such examination he has determined that the accrued depreciation on said plant as fixed and determined by said Grote is in every respect fair and reasonable.

Deponent further says that in determining and ascertaining the reproduction cost of said property he has ascertained and considered the reasonable amount of working capital required by complainant in the conduct of its gas business, such determination being arrived at and fixed, among other ways, by the data and statistics furnished to him as aforesaid by said Whitney.

Deponent further says that in arriving at and determining said reproduction cost he has also considered the fact that the plant is a going concern. That he has also considered the character of the plant with its condition of repair and its adaptability and capacity for generating and furnishing gas as found by the said Grote and by affiant's own personal examination. That in arriving at said reproduction cost he has placed no value on good-will or upon unexpired term of any franchise of the Company or on future profits based upon any unexpired term thereof, and that in the determination of said reproduction cost no regard whatever has been had to the complainant's capitalization as represented by its outstanding stocks and bonds.

Deponent further says that the phrase "reproduction cost" as used in this affidavit and that the reproduction cost ascertained by affiant  
69 as hereinafter stated, means the amount of money that would be required as of the date hereinbefore specified to construct and replace the plant as shown by said inventory on the basis of labor and material prices at the time above stated, and arrived at as herein stated, and on the basis of a construction program such as is usual and customary for the economical, actual construction of such a plant in the shortest period practicable and consistent with economical, uninterrupted and continuous construction work, proceeding in an orderly manner and without taking into account any extraordinary conditions excepting those necessarily encountered or inherent in construction work of that character, and that such reproduction cost has been ascertained in accordance with

the well established engineering practice in valuation matters excepting in certain particulars herein stated and that in every instance where such practice was not strictly followed the method adopted by affiant tends to produce a lower cost than would have resulted if the established valuation practice had been in all respects strictly followed. Among other things such "reproduction cost" has been arrived at on the basis that the various classes of property will be acquired or constructed in the usual order of sequence in which they would be actually acquired and constructed in an undertaking of the size and type involved and that a like consideration will be given to the indirect costs as is given to the direct costs for labor and material. That such "reproduction cost" is based upon the fact that portions of the work will be carried out by contract,

either under a single contractor or with sundry subcontractors  
70 or by the construction organization of the complainant itself,

following in this respect the practice which has been generally developed in the actual construction of gas plants in their entirety or in the construction of a single complete service rendering unit. That the entire program will be carried out under such arrangements as are inherent in gas plant developments of the character under review when such property is being erected by men of established business reputation and credit ratings. That the work will not be considered as being in process of construction until the last unit of work is completed, but rather that each service unit capable of independent operation will be placed in service as soon as completed, so that gas service may be first supplied in the most populous and promising sections of the City, so that the overhead charges are reduced thereby. That affiant has not attempted to place any valuation on the land on which the manufacturing plant is located, but has accepted the valuation of \$25,000 placed thereon by complainant, and has apportioned to the Gas Department a value on such portion of such land as described in Grote's affidavit as being used for gas purposes and as stated by him, based on the area on which the gas plant is located. That no allowance is made in such estimate for the cost of pavement which must necessarily be cut and replaced in such construction work, nor for such paving as may actually have been disturbed by complainant.

Deponent further says that it is well known that the trend of commodity prices has been upward for a period of years. That

prior to the war and for a period, say of ten or fifteen years  
71 prior thereto, the trend of commodity prices while showing minor variations, on the whole has been steadily upward, year after year. That notwithstanding said trend there have been some rather violent fluctuations; the commodity prices rose rather sharply in 1906 and culminated in a high price in 1907, and after the panic of 1907, there was a sharp drop in such prices. That thereafter, however, the trend was steadily upward and remained that way until a considerable period after the outbreak of the European war. That early in 1916, however, the prices of commodities rose very sharply and the price curve continued its sharp rise throughout 1916 and '17 and '18, after which the upward tendency was not so

pronounced. That it is a fact, however, that commodities have still risen in price since 1918 and at this date are higher, generally speaking, than they were a year ago. That in speaking of commodities in this connection deponent has in mind general commodities as defined by Bradstreet's index or Babson's statistics or the curves shown by the London Economist; that commodities entering into the construction of a property like the one under consideration follow the general commodity price curves very accurately.

Deponent further says that in determining the unit costs to be applied to the said gas property of complainant and in addition to the facts hereinbefore stated, affiant has reinforced his general knowledge of costs and prices by special, general and local investigation and has used figures obtained in this way as guides, and as reinforcing his general knowledge and judgment. That in

72 making his determination of said reproduction cost be used the results obtained from inquiries made to certain contractors in the City of St. Cloud as to the cost of building material and labor in that City.

Deponent further says that the labor rates which he has used in his estimate of reproduction costs have been based on the Union scale of wages paid for the various classes of labor in the said City of St. Cloud. That the prices for equipment were based upon affiant's general knowledge of the cost of such equipment. That the costs of cast iron pipe and specials for the periods used were based on quotations by the United States Cast Iron Pipe & Foundry Company, which is the largest manufacturer of cast iron pipe in the country, and that to the actual cost of such pipe f. o. b. factory affiant has added the actual cost of freight to St. Cloud. That the cost of steel pipe was based on quotations for the period covered by the manufacturers of that commodity and that the item of labor of installation costs and of miscellaneous and sundry expenses was arrived at by considering the above mentioned labor scales and by using his general knowledge and judgment with respect to the subject matter. That the cost of meters was based on quotations by manufacturers for the period used, and that the labor of installation and sundry and miscellaneous expenses were based on his general judgment and experience reinforced by a study of wages for such class of service at said City of St. Cloud.

Deponent further says that the costs of the general office furniture and fixtures were based upon prices prevailing at the 73 City of St. Cloud at that time for property of that character and that the portion of such values assigned to the Gas Department of complainant's business is based upon the apportionment made by the complainant, which deponent believes to be fair and reasonable.

Deponent further says that the unit costs arrived at in the foregoing manner were applied to the items as listed in the inventories prepared as aforesaid by said Grote and result in the reproduction cost of the various items of physical property hereinafter set forth; and that the reproduction costs hereinafter set forth correctly represent affiant's judgment of the fair and proper reproduction costs

of such items based on prices current for the period mentioned. That such prices, however, cover only the bare cost of materials and labor and do not include any items for overhead charges.

Deponent further says that to the bare costs of materials and labor he has added twenty per cent to cover such overhead charges or items of additional cost; that said items of additional cost include those generally included in this classification covering preliminary, legal, organization and general expenses, cost of engineering and superintendence, an allowance for omissions and contingencies and an allowance for interest and taxes during construction; that he believes this allowance of twenty per cent to be a fair and proper allowance for items of additional cost; that he believes that this al-

lowance should be spread equally over the entire physical  
74 property, inclusive of land, and that if in his judgment there are certain items such as land upon which, perhaps, a smaller allowance might be properly made, if specific allowances were made for each item of property, that in such event there would be other and offsetting items upon which larger allowances should fairly and properly be made. That it is his judgment and experience that an allowance of twenty per cent for such items spread over the entire physical property is a fair and just allowance for this purpose, and that the total allowance for overhead charges arrived at in this manner would be to all intents and purposes the same as if the total allowances for overhead charges were arrived at by placing separate and specific allowances varying in amount on the various items of property.

Deponent further says that he has determined and fixed upon a fair allowance for working capital necessary for the safe and economical operation of the complainant's gas business and to assure the consumer an adequate and continuous service. That he based this allowance upon the average amount of materials and supplies on hand as shown by the complainant's records and on the facts, data and statistics appearing in the said affidavit of A. G. Whitney, and in addition thereto has made an allowance to cover the necessary cash and current assets, this allowance being estimated at ten per cent on the gross earnings from the sale of gas. That he believes that amount to be a just and proper allowance for this item and is

in accord with usual valuation practice.

55 Deponent further says that he has included, as an element in the reproduction cost of the property as determined by him, an allowance of ten per cent for cost of financing and that he believes this to be a just and reasonable amount for this purpose and an expenditure which must be made in reproducing a utility property of this character. That under this allowance for cost of financing he has included two elements in chief: The first portion may be understood to include the difference measured in dollars between the amount paid for the securities by the ultimate purchaser of the securities and the net amount realized by the Company issuing the same securities, the other portion of this element of value being the reward of the man who conceives the enterprise and brings it into being. That under the first element of the cost of financing

he includes brokerage fee and the profit of the broker who undertakes to put the securities on the market and to dispose of them for the Company issuing the security. That he furthermore includes the profit or commission charged by any broker or banker for selling the preferred stock of the Company. That he furthermore includes the cost of independent engineering, accounting and legal reports, made at the instance of the banker or broker to determine the degree of safety of the security at the expense of the Company issuing the securities; that these engineering and accounting reports are necessary to determine the security behind the proposed issue as well as to determine the future earning possibilities of the company. That

he also includes such legal investigations as are customarily made in transactions of this character. That he also includes

under this item the cost of soliciting, advertising and office expenses relating to the sale of the securities by the broker as well as the cost of printing and engraving bonds, mortgages, deeds of trust, certificates of preferred and common stock, as well as the time and salary and expenses of Company officials involved in carrying out the financial plans, interesting capital, signing bonds, stock certificates and the like. That he does not include any portion of so-called "Bond Discount" under this element of value. That "Bond Discount" in the usual acceptance of the term is the difference between the par value of the security and the price paid by the purchaser and that that difference is customarily amortized over the life of the security and included under the head of "Operating Expenses." That, however, in addition to this Bond Discount there are other expenses of cost of financing which are not ordinarily taken care of under the item of "Bond Discount" and which consequently must be included in the capital account. That in reproducing a property of this character it would be necessary to issue temporary short-term construction notes to provide such portion of the cost of construction as was not advanced by the organizers of the enterprise. That after the plant had been constructed and put upon an operating basis such short-term notes would be refunded by means of an issue of first mortgage bonds, which, together with the preferred stock and such of the common stock as might be issued as a bonus, would constitute the outstanding securities of the Company. That the difference between the amount paid by the ultimate purchaser and the

amount realized by the Company from the sale of short-term notes, first mortgage bonds and preferred stocks is not ordinarily included under the head of "Bond Discount," and

therefore is an item which should properly be capitalized and that finally an allowance of ten per cent for this item is a minimum fair allowance under normal conditions of financing and that in the present state of the money market this allowance should be greatly in excess of the percentage named. That the second chief element under this cost of financing is the reward of the man who conceives the enterprise, who interests other men to undertake to float the Company with him, who outlines financial plans, secures the franchises and devotes a large portion of his time and energy to bringing the Company into being and putting it on proper operating basis. That such a

man would have to be a man of considerable ability and financial standing and one whose time would be very valuable and who could command a very high salary in almost any enterprise. That if such a man, with good financial connections, absolute integrity, high ability, initiative and foresight, gives a large portion of his time for a period of from six months to perhaps several years and over to organize and put on an operating basis a utility company, which effort may, or may not succeed, dependent upon conditions, it is only reasonable to assume that he is entitled to a suitable reward if his efforts are successful, and that the reward should be commensurate with the risk which he takes. That it follows that if he is entitled to a reward for his efforts and that if his efforts are crowned with success in

78      that the company is eventually put on a good operating basis, there can be no question but that his efforts have added a cer-

tain value to the property and that through his efforts and initiative the community and the consumers in particular have benefited in that they enjoy a service which they would not otherwise have. That if, therefore, he has created a value, and the deponent believes that he has, it is certain that such value as he has created attaches to the company, belongs to the company and unless returned to the company in some form or other is an element which should fairly be considered in the Capital Account. That finally such expenses as may be incurred by the organizer or organizers of such enterprise in floating the project and bringing it into successful operation are properly a portion of the cost of financing and should be considered in this allowance. Considering all of these elements of cost of financing as applied to the reproduction cost of the gas utility at St. Cloud, deponent has fixed upon an allowance of ten per cent of the physical property including working capital as covering this item, and in arriving at the final amount he has divided the cost of the physical property, including the allowance for working capital, by 90% in order to arrive at the full amount of monies which must be provided to finance the enterprise and that the amount which he has allowed is ten per cent of the full amount which must be provided or the difference in dollars between the full amount and the sum total of the reproduction cost of the physical property and the working capital.

79      Deponent further says that he has included in his estimate of the reproduction cost of the property an allowance for what is generally known as Going Value. That this element may be defined as that element of value which inheres in a plant that has an established business as distinguished from one which has yet to create a business or as defined in another way as the difference in value between a plant which has attached to it a business and which is enjoying a revenue and the mere "bare bones" of the same plant without any business attached to it and without the enjoyment of any revenue. That this element of value is intangible and cannot, therefore, be determined by any fixed rule or measure; that there are, however, certain general measures of going value or methods of approximating the amount which are in more or less general use and are more or

less recognized as proper measures of this element of value. That in arriving at the amount which he has allowed in estimating this value, he has used five of these generally accepted measures and having considered all of them and giving due weight to each one he has finally arrived at a figure which he has allowed for this purpose. That the five measures or methods which he used are as follows:

1. The "Gross Revenue Method," which is in general based upon the theory that the average operators of a public utility are willing to spend \$1.00 for each additional dollar's worth of annual business which they can secure. This measure has been used in several leading rate cases and if applied in the case of the Gas Utility at St. Cloud would result in an amount of \$41,029.97.

80        2. The "Per Consumer Method," which is based upon the theory that the operator of the average utility is willing to spend \$30.00 in order to attach to his lines a new consumer and to bring that consumer's consumption of gas up to the average consumption. This method has been used by several prominent engineers in leading rate cases and if applied to the Gas Utility at St. Cloud would result in a figure of \$37,380.00.

3. The "Percentage of Physical Property Method," which has been used by many commissions and upheld in many courts in some of the leading rate cases of the country. That the amounts allowed as a percentage of the physical property vary from approximately 7½% to as high as 33%. That the average allowance for this purpose would appear to be approximately 20% and that he has taken as a basis for this measure of Going Value 20% of the reproduction cost of the property. That this percentage, applied to the reproduction cost of the St. Cloud gas plant on current price basis as of October 1, 1920, would amount to \$77,544.00.

4. The "Accrued Depreciation Method." This method is based upon the theory that where a property has been well maintained no deduction shall be made from the reproduction cost of the property in arriving at the fair value. Since the reproduction theory ordinarily assumes that accrued depreciation shall be deducted, it is customary to consider going value to be equal to the accrued depreciation, so that the result is that return is based upon the reproduction cost of the property. In this instance the cost of reproduction of the physical property as of October 1, 1920, is  
81        \$432,134.00, and the depreciated cost \$397,763.00. The resultant going value will be \$34,371.00. The above mentioned sum of \$432,134 includes 20% for the overhead charges referred to and 10% for the cost of financing referred to.

5. The "Early Loss Method." This method is based upon the assumption that the investors in a utility enterprise are entitled at all times from its inception to a fair and reasonable return upon the value of their property actually used and employed for a public use. Where any utility has failed to earn such fair and reasonable return at all times the accumulated deficits of earlier years which

remain unrequited by reason of later excess profits, constitute the measure of going value. In this case deponent has taken as a base the book costs of the property as alleged in the bill of complaint and shown by the Company's records as disclosed to him by the said data and statistics furnished by said Whitney and has computed upon this base a minimum fair return of 8%. He has also taken the operating expenses as shown by the records and statistics furnished by said Whitney but has adjusted the allowance for depreciation to 2% of the book cost of the physical property instead of the figure which was actually charged by the Company. The resultant figure shows a going value arrived at by this method as of August 31, 1920, of \$184,523.68. By using a 6% rate of return the resultant going value would be \$117,569.00. Considering the nature of the said utility itself, the community in which it is located and its earning possibilities under fair and reasonable rates, he has found that the sum of \$35,000 is a just, fair and reasonable allowance for this element of going value.

82 Deponent further says that considering the cost of the physical property, including said overhead charges, said fair allowance for working capital, said fair allowance for cost of financing, said fair allowance for going value, it is affiant's judgment that the reproduction cost of the property in question as of the 1st day of October, 1920, on the basis of prices current as of that date was \$479,134.00, and that the cost thereof as depreciated was \$444,763.00. That the following is a statement more in detail as to the various elements and classifications entering into said reproduction cost:

Classification.	Cost of reproduction, new.	Condition, per cent.	Cost of reproduction new, less depreciation.
Land .....	\$18,142	100	\$18,142
Transmission and Distribution	209,498	94	197,611
Buildings and Miscellaneous Structures .....	27,672	89	24,727
Plant Equipment .....	126,404	88	111,362
General Equipment .....	6,005	82	4,945
Total Physical Property	\$387,721	92	\$356,787
Fair Allowance for Working Capital .....	12,000	100	12,000
Cost of Financing at 10%....	44,413	92	40,976
Fair Allowance for Going Value	35,000	100	35,000
Total Property and Business .....	\$479,134	93	\$444,763

83 Deponent further says that he has examined the operating expenses of the complainant so far as such expenses relate to the operation of its gas property in said City of St. Cloud for

the year ending August 31, 1920. That in making such examination he has relied upon the data and statistics furnished to him as aforesaid by said A. G. Whitney. That he finds said operating expenses for the twelve months ending August 31, 1920, without regard whatever to any depreciation or return upon value of property, to be the sum of \$52,435.15. That from his examination as aforesaid he finds that after making a fair allowance for depreciation complainant to pay operating expenses on the basis of the eight months of 1920 must receive at least \$1.90 per thousand cubic feet of gas sold. That he has also further examined said data and statistics furnished by said Whitney so far as the same relate to the actual cost of complainant's gas property, and as the same is set forth in the bill of complaint herein, and he finds that making an allowance of 10% return on such actual cost of the property the complainant must receive at least the sum of \$2.55 per thousand cubic feet of gas sold in order to pay its said operating expenses and a proper depreciation charge and a return of 10% on said book cost.

Deponent further says that upon the basis of the cost of reproduction of said property so devoted to said gas business, less depreciation on the basis of prices current as of October 1, 1920, the complainant must have a rate of at least the sum of \$3.39 per thousand cubic feet of gas sold in order to pay such operating costs, depreciation charges and a return of 10% on the reproduction  
84 cost of said property less its depreciation.

Deponent further says that in his judgment the actual operating costs of the complainant in the manufacture, sale and distribution of its gas for the balance of the year 1920, that is to say, since August 31, 1920, will be considerably more than those shown upon the figures hereinbefore given.

A. J. LURIK.

Subscribed and sworn to before me this 16th day of November, 1920.

LARA H. CLOUGH, [Notarial Seal.]  
*Notary Public, County of Hennepin, Minnesota.*

My commission expires Mar. 20, 1924.

Filed in U. S. District Court November 20, 1920.

85 United States District Court, District of Minnesota, Sixth Division.

ST. CLOUD PUBLIC SERVICE COMPANY, Complainant,  
vs.

CITY OF ST. CLOUD, Defendant.

*Affidavit of W. A. Durst.*

STATE OF MINNESOTA,  
*County of Hennepin, ss:*

W. A. Durst being first duly sworn on his oath says that he resides in the City of Minneapolis, Minnesota, and is the President of The Minnesota Loan and Trust Company. That he has been connected with said Company for more than thirty years. That a very large portion of the business of that Company consists in the purchase and sale of securities, municipal, corporation, public utilities, Government and others. That that branch of the business has been for several years under affiant's direct supervision and control.

Deponent further says that the present condition of the money market is such that it is necessary for any public utility company, like complainant, to earn at least ten per cent on the value of its property in order to be able to float or sell its securities.

W. A. DURST.

Subscribed and sworn to before me this 17th day of November, 1920.

R. A. SCALLEN, [Notarial Seal.]  
*Notary Public, County of Hennepin, Minnesota.*

My commission expires Aug. 20, 1922.

Filed in U. S. District Court November 20, 1920.

86 United States District Court, District of Minnesota, Sixth Division.

ST. CLOUD PUBLIC SERVICE COMPANY, Complainant,  
vs.

CITY OF ST. CLOUD, Defendant.

*Affidavit of A. G. Whitney.*

STATE OF MINNESOTA,  
*County of Stearns, ss:*

A. G. Whitney, being first duly sworn on his oath says that ever since its organization he has been and still is the President of complainant and has resided for many years and still resides in the defendant City. That he has been the executive officer of complainant

in charge of its entire business since its organization, including the operation of its gas plant.

Deponent further says that he was likewise President of complainant's predecessor, The Public Service Company of St. Cloud, Minn., the grantee named in the ordinance described and set forth in paragraph 4 of the amended bill herein, and that during all of the times when the said predecessor of complainant was operating said gas plant deponent was the President and executive officer having charge of its entire business, including the operation of said gas plant.

Deponent further says that all of the complainant's books of account have been kept under his general jurisdiction and control and that he has always kept himself advised as to all entries made therein and knows that the same are in every respect true and correct and contain a true and correct recital of all of complainant's  
87 business affairs and operation. That likewise all of the books of account of complainant's predecessor, the said The Public Service Company of St. Cloud, Minn., the grantee named in said ordinance, were kept under deponent's general jurisdiction and control, and he always kept himself advised as to all entries made therein and knows that the same are in every respect true and correct and contain a true and correct recital of all of said Company's business affairs and operation while it was maintaining and operating said gas plant.

Deponent further says that on or about the 23d day of October 1920, he furnished to A. J. Luick in the office of William A. Baehr, Consulting Engineer, in the City of Chicago, written data and statistics taken from complainant's books and from the books of said predecessor, the grantee named in said ordinance, with respect to said gas property, and all of the operations connected therewith, such data consisting of the following:

- (1) Statement of earnings and expenses for the years of 1907, 1908, 1909, 1910, 1911, 1912, 1913, 1914, 1915, 1916, 1917, 1918, 1919, and the first eight months of the year 1920.
- (2) Statement of earnings and expenses by months from January 1, 1919, to September 30, 1920, both inclusive.
- (3) Statement of materials and supplies on hand from September 30, 1918, to September 30, 1920, both inclusive.
- (4) Statement of coal, oil and coke on hand at the end of each month from September 30, 1918, to August 31, 1920.
- (5) Balance sheet of the St. Cloud Public Service Company as at August 31, 1920.  
88                 (6) Balance sheet showing assets and liabilities of the gas department separated from the general balance sheet of complainant as at August 31, 1920.
- (7) Original cost of the gas property and plant as at August 31, 1920.

(8) Operating results and efficiencies by years from January 1, 1915, down to and including the nine months ending September 30, 1920.

(9) Average cost of coal, coke and oil from September 30, 1918, to August 31, 1920.

(10) Average selling price of residuals by years from January 1, 1914 to September 30, 1920.

(11) Study of labor costs by years from January 1, 1915 to October 31, 1920.

(12) Gas sales, gas made and gas unaccounted for from January 1, 1915 to August 31, 1920.

(13) Number of gas meters in service September 30, 1910 to September 30, 1920.

(14) Population statistics of St. Cloud from the year 1900 to the year 1920.

(15) Method used in proportioning expenses between the electric department and the gas department.

(16) Actual purchase price of gas meters showing invoice price, freight charges and size of meters from January 1, 1917, to September 30, 1920.

(17) Sundry purchases of cast iron and steel pipe from January 1, 1918 to September 30, 1920.

Deponent further says that all of said statistics so furnished to the said Luick were taken from the books and accounts of complainant and its said predecessor and that each and every part thereof is true and correct.

Deponent further says that complainant is the owner of all those lands and premises lying and being in the City of St. Cloud,  
89 County of Stearns and State of Minnesota, described as follows, to-wit: Lots numbered nine (9) and ten (10) in Block four (4) in the Town of St. Cloud (Wilson's survey). That on said lands and premises are located and situated the buildings and structures, equipment and machinery constituting the gas manufacturing plant of the complainant.

Deponent further says that said lands and premises are particularly well located for said gas manufacturing purposes, being situate on the main line of the Great Northern Railway Company, and that the complainant owns its own side track connecting with said main line, which said side track is located upon said lands and premises.

Deponent further says that he has been a resident of the City of St. Cloud for more than thirty years; that he has always been a large holder and owner of real estate therein and has always been advised as to the value of all real properties in said City, including the value of the premises hereinbefore described. That he knows of his own knowledge that the lands and premises hereinbefore de-

scribed, to-wit: Lots numbered nine (9) and ten (10), in Block four (4), in the Town of St. Cloud (Wilson's survey) are now reasonably worth and of the fair market value of Twenty-five thousand dollars (\$25,000).

A. G. WHITNEY.

Subscribed and sworn to before me this 8th day of December 1920.

[Notarial Seal.]

GEO. PLANK,

*Notary Public, County of Stearns,  
State of Minnesota.*

My commission expires August 25, 1922.

Filed in U. S. District Court December 23, 1920.

90      United States District Court, District of Minnesota, Sixth Division.

ST. CLOUD PUBLIC SERVICE COMPANY, Complainant,

vs.

CITY OF ST. CLOUD, Defendant.

*Notice of Motion.*

To the above-named defendant:

You will please take notice, That the above named complainant will move one of the Judges of the above named Court in Chambers at the Federal Building, in the City of Minneapolis, County of Hennepin and State of Minnesota, on the 30th day of November, 1920, at ten o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard for an order directing a temporary or preliminary injunction to be issued out of this Court, pending this action, against the defendant, its City Council, its Commission and all its officers, agents, attorneys, representatives and departments, restraining and enjoining them, and each of them, from in any manner by ordinance or otherwise, *from* interfering with the complainant in raising the rate to be charged for its gas in the City of St. Cloud to the sum of \$3.39 per thousand cubic feet and from instituting or authorizing or directing any suit or suits, action or actions or any proceeding whatever against complainant, or any of its officers, agents or employes, the object or purpose of which or the relief

sought in such action, suit or proceeding is to interfere with  
91      or restrain or enjoin the complainant from putting into effect  
said rate of \$3.39 per thousand cubic feet, or from attempting  
to force complainant to continue to sell its gas at the rates pre-  
scribed in that certain ordinance set forth in paragraph 4 of the  
bill of complaint herein or at any less rate.

Said motion will be made upon the bill of complaint and on the accompanying affidavits of A. G. Whitney, A. J. Luick, George F. Grote and W. A. Durst, copies of which are herewith served upon you.

Dated this 19th day of November, 1920.

J. D. SULLIVAN,  
St. Cloud, Minnesota;  
COBB, WHEELWRIGHT & BENSON,  
Minneapolis, Minnesota,  
*Solicitors for Complainant.*

Filed in U. S. District Court November 20, 1921.

92 United States District Court, District of Minnesota, Sixth Division.

ST. CLOUD PUBLIC SERVICE COMPANY, Complainant,  
vs.  
CITY OF ST. CLOUD, Defendant.

*Order to Show Cause.*

Upon reading the bill of complaint herein and upon the accompanying affidavits of A. G. Whitney, A. J. Luick, George F. Grote and W. A. Durst, and on motion of J. D. Sullivan, Esq., and Messrs. Cobb, Wheelwright & Benson, solicitors for the complainant;

It is hereby ordered, that the above named defendant appear before one of the Judges of said Court, in Chambers at the Federal Building in the City of Minneapolis, County of Hennepin and State of Minnesota, on Tuesday, the 30th day of November, A. D. 1920, at ten o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, and show cause why a temporary or preliminary injunction should not be issued herein and out of this Court, pending this action against the defendant, its City Council, its Commission and all of its officers, agents, attorneys, representatives and departments, restraining and enjoining them and each of them from in any manner by ordinance or otherwise interfering with the complainant in raising the rate to be charged for its gas in the City of St. Cloud to the sum of \$3.39 per thousand cubic feet, and from instituting or authorizing or directing any suit or suits, action or

actions or any proceeding whatsoever against complainant  
93 or any of its officers, agents or employes, the object or purpose of which or the relief sought in any such action, suit or proceeding is to interfere with or restrain or enjoin the complainant from putting into effect said increased rate for gas herein, or from attempting to force complainant to continue to sell its gas at the rates prescribed in that certain ordinance described in paragraph 4 of the bill of complaint herein.

Let a copy of the bill of complaint and of said accompanying affidavits be served upon the defendant at least eight days prior to the date when this order to show cause is returnable.

Dated this 19th day of November, 1920.

WILBUR F. BOOTH,  
*Judge.*

Filed in U. S. District Court November 20, 1920.

94 United States District Court, District of Minnesota, Sixth Division.

ST. CLOUD PUBLIC SERVICE COMPANY, Complainant,

vs.

CITY OF ST. CLOUD, Defendant.

*Stipulation.*

It is hereby stipulated and agreed by and between the respective parties to the above entitled action that the affidavit of A. J. Luick herein may be amended in the following particulars, to-wit:

By adding after the word "complainant" in the second paragraph of said affidavit on page 4, the words, "and of The Public Service Company of St. Cloud, Minn," the grantee named in the ordinance described in paragraph 4 of the amended bill herein.

J. D. SULLIVAN,  
COBB, WHEELWRIGHT &  
BENSON,

*Solicitors for Complainant.*

R. B. BROWER,  
*Solicitor for Defendant.*

Filed in U. S. District Court December 23, 1920.

95 United States District Court, District of Minnesota, Sixth Division.

ST. CLOUD PUBLIC SERVICE COMPANY, Complainant,

vs.

CITY OF ST. CLOUD, Defendant.

*Affidavit of R. B. Brower.*

STATE OF MINNESOTA,

*County of Stearns, ss:*

R. B. Brower, being first duly sworn, deposes and says, that he is the attorney for said defendant, and City Attorney. That the records in the office of the Register of Deeds of said Stearns County, in which the properties of the Public Service Company, a corporation, predecessor in interest to the complainant, were situate, show that im-

mediately after the passage of contractual ordinance No. 160 by the City of St. Cloud, that The Public Service Company, pursuant to a resolution of the stockholders of the company, unanimously passed and adopted on January 6th, 1906, and confirmed by the Board of Directors of said Company at a meeting held on said same day, made a Trust Deed or Mortgage dated December 1st, 1905, and recorded in the office of the Register of Deeds of Stearns County on January 16th, 1906, at two o'clock P. M., Book 66 of Mortgages, pages 444 to 471, to secure a bond issue in the sum of \$500,000.00. That said Trust Deed mortgaged to The American Trust and Savings Bank, an Illinois corporation, and Frank H. Jones, of Chicago, as Trustees, the property of said The Public Service Company to secure said Bond Issue. That said bonds were for \$1,000 each; that Numbers 1 to 10 thereof became due December 1st, 1911, and Bonds 191 to 96 500 thereof became due December 1st, 1930, and that the other numbers of said authorized bonds became — upon a date or dates between said two stated maturities.

That the resolutions authorizing said procurement of said loan, as adopted by the stockholders of said company, provided for the use of said \$500,000 for the "purpose of paying the indebtedness of the company, and of purchasing, constructing, enlarging and equipping its gas and electric works at St. Cloud, Minnesota, etc."

That the property mortgaged consisted of the gas and electric works of the Company, and also,

"All the property, both real and personal, including all the contracts, leases, and all the property, rights, franchises and privileges now owned or hereafter to be acquired by the Public Service Company of St. Cloud, pertaining to and in anywise relating to the gas and electric works located in and near the City of St. Cloud, Minnesota, together with all of its income and profits, etc."

That contractual ordinance No. 160, and all rights thereunder, was covered by said mortgage or trust deed, and that the financing of the gas plant erected by said The Public Service Company was, after the passage of said ordinance, immediately resorted to in the form of said trust deed.

R. B. BROWER.

Subscribed and sworn to before me this 21st day of January, 1921.

[SEAL.]

MARIE THILL,

*Notary Public, Stearns County, Minn.*

My Commission expires June 25, 1922.

Filed in U. S. District Court January 22, 1921.

97      United States District Court, District of Minnesota, Sixth Division.

ST. CLOUD PUBLIC SERVICE COMPANY, Complainant,  
vs.

CITY OF ST. CLOUD, Defendant.

*Affidavit.*

STATE OF MINNESOTA,  
*County of Stearns, ss:*

Olof Frick, Secretary of the Great Northern Granite Company, Alfred Hagen, President of United Granite Company, C. O. Kallin, President of National Granite Company, Hugo Freeberg, Secretary of Royal Granite Company, David Alexander, President of Pioneer Granite Company, A. W. Simmers, Secretary of A. M. Simmers & Sons, A. V. Ahlgren, Secretary and Treasurer of Granite City Granite Company, W. W. Holes, Secretary of Holes Bros. Company, William Campbell, President of North Star Granite Company, William J. Bohmer, President of Melrose Granite Company, G. J. Hilder, President of Hilder Granite Company, A. C. Carlson, Secretary of Monumental Sales and Manufacturing Company, and A. E. Hagquist, President of Central Minnesota Granite Company, being first duly sworn on oath, depose and say, each for himself, that they are, respectively, the officers of the granite manufacturing corporations or concerns whose names are given immediately following the names of the individuals as stated above. That said concerns have been consumers of electric power and energy furnished by the complainant in this cause during the last several years.

That the following stated rates for electrical current prevailed during the periods of time hereinafter stated, and the increases were made effective by the complainant at the times stated.

That each of the bills for power at said rates was subject  
98      *That each of the bills for power at said rates was subject*

to a discount of 10 per cent in connection with payment on or before the 10th day of the month next succeeding the furnishing of the current.

That up to December, 1919, a ten per cent surcharge was placed on said bills on the basis of the rates affective during the time previous to that date, which surcharge offset the discount.

That previous to December 1st, 1919, with the addition of the 10 per cent surcharge, subject to the discount of 10 per cent if paid on or before the 10th day of the month, the rates for current for power purposes furnished by complainant to granite concerns in the St. Cloud field, were as follows:

First	3,000	K. W. H.	.0222	per	K. W. H.	Net	.02
Next	2,000	"	.02	"	"	"	.018
Next	5,000	"	.1777	"	"	"	.016
Above	10,000	"	.1666	"	"	"	.015

On and after December 1, 1919, the increased rates imposed and

enforced by the complainant for current for power purposes for granite users in the St. Cloud field were as follows:

First	3,000	K. W. H.	.3222 per K. W. H.	Net .029
Next	2,000	"	.2888 "	" .026
Next	5,000	"	.2666 "	" .024
Above	10,000	"	.025 "	" .0225

Effective August 1, 1920, said rates for said power enforced by complainant were as follows:

First	3,000	K. W. H.	.04777 per K. W. H.	Net .043
Next	2,000	"	.04444 "	" .04
Next	5,000	"	.04222 "	" .038
Above	10,000	"	.040555 "	" .0365

Effective September 1, 1920, and billed out for September, 1920, the rates demanded by said company for said current were as follows:

99

First	3,000	K. W. H.	.05888 per K. W. H.	Net .053
Next	2,000	"	.05555 "	" .051
Next	5,000	"	.05333 "	" .048
Above	10,000	"	.051666 "	" .0456

In addition thereto, rates for current for power purposes to quarry customers who received said current after November 1, 1919, were a flat rate, subject to discount for prompt payment, of .0666 per K. W. H., with no reductions for quantities used.

Also, effective December 1, 1919, when the purchase of 10 per cent went off, the complainant, in reading its meters for a monumental plant and for a quarry operated by the same concern, did not consolidate the readings, but billed out separately, and had the benefit of the higher rate.

Further affiants say not, except that said rates now attempted to be put in operation and effect by the complainant so largely increases the cost of manufacturing, that these affiants believe and state that, after market conditions settle, that the St. Cloud granite producers will be at a disadvantage in competition with other granite centers of the country; that affiants are informed and believe that the rate for current for power in the Barre district is about one-half of the present rate sought to be enforced by the complainant.

OLOF FRICK.

ALFRED HAUGEN.

CARL O. KALLIN.

HUGO E. FREEBURG.

DAVID ALEXANDER.

A. W. SIMMERS.

A. V. AHLGREN.

W. W. HOLES.

WILLIAM CAMPBELL.

WM. J. BOHMER.

G. J. HILDER.

A. C. CARLSON.

A. E. HAGQUIST.

**62** ST. CLOUD PUB. SERV. CO. VS. CITY OF ST. CLOUD.

**100** Subscribed and sworn to before me this 29th day of November, 1920.

[Notarial Seal.]

FLORENCE M. BOWERS,  
*Notary Public, Stearns County, Minn.*

My Commission expires March 27, 1927.

Filed in U. S. District Court January 22, 1921.

**101** United States District Court, District of Minnesota, Sixth Division.

ST. CLOUD PUBLIC SERVICE COMPANY, Complainant,

vs.

CITY OF ST. CLOUD, Defendant.

*Affidavit of C. C. Dragoo.*

STATE OF MINNESOTA,  
*County of Stearns, ss:*

C. C. Dragoo, being first duly sworn on oath, deposes and says, that he is the President of the Gopher Granite Company, a Minnesota corporation, engaged in the manufacture of granite monuments at St. Cloud, Minnesota, and that for several years last past said Company has been a consumer of electrical current for power purposes at its plant.

That affiant has been, and is now, the Chairman of the Power Committee of the St. Cloud granite producers, and has been present at various negotiations as between the Committee and the President of the St. Cloud Public Service Company, and is familiar with the granite establishments and manufactories in the St. Cloud granite district, and knows the amount of power consumed by them in connection with their business. That there are twenty leading firms connected with the granite industry in, and in the vicinity of, the City of St. Cloud. That the average yearly consumption of current for power purposes employ'd in the business of said twenty concerns, based on the actual calculated consumption for the month of August, 1920, was 4,250,000 K. W. H. That said estimate is a conservative

estimate. That in addition to said twenty concerns, there  
**102** are eight or more smaller concerns, and that the total amount of power consumed would be somewhat larger than the above estimate, in affiant's judgment and belief.

That approximately the actual amount paid to complainant by said twenty granite concerns, for power used based on the rate effective on and before August 1st, 1920, was the sum of \$7,712.94.

That on the basis of the rate of .05888 per K. W. H., and reducing down to .051666 per K. W. H., for quantities over 10,000 K. W. H. in effect during October, 1920, for the consumption of a total, by eighteen of said twenty concerns, of 300,633 K. W. H.,

the gross amount of the Service Company's charge for the current for said month of October, 1920, to eighteen of the twenty firms was \$16,517.35, and with discount off \$14,875.69.

That according to said figures for the said month of August, 1920, and for said month of October, 1920, the service Company obtained more than double the returns for a reduced quantity of current under the higher rates of November, 1920. In August, 1920, the amount of current furnished and supplied for which said net charge of \$7,712.94 was made, was approximately 312,000 K. W. H., and for said current charged for in said sum of \$14,875.69, the quantity was, as stated, 300,633 K. W. H.

Further affiant saith not.

C. C. DRAGOON.

Subscribed and sworn to before me this 29th day of November, 1920.

[Notarial Seal.]

MAIE THILL,  
*Notary Public, Stearns County, Minn.*

My Commission Expires June 25, 1922.

Filed in U. S. District Court January 22, 1921.

103 United States District Court, District of Minnesota, Sixth Division.

ST. CLOUD PUBLIC SERVICE COMPANY, Complainant,

vs.

CITY OF ST. CLOUD, Defendant.

*Affidavit of William W. Matson, Mayor; Julius Adams, City Commissioner, and Henry Maybury, City Commissioner, Constituting the City Commission of the City of St. Cloud.*

STATE OF MINNESOTA,  
*County of Stearns, ss:*

William W. Matson, Julius Adams and Henry Maybury, being first duly sworn on oath, depose and say, that they are, respectively, the Mayor and members of the City Commission, duly elected, qualified and acting, of the City of St. Cloud, under the terms and provisions of its Home Rule Charter, the organic act of said city under which, since the year 1911, the affairs of said city have been administered.

That promptly upon the institution of the above entitled action, the said City Commission secured the services of Mr. Louis P. Wolff, a Valuation Engineer, residing in the City of St. Paul, Minnesota, for the purpose of making a valuation of that portion of the property of the St. Cloud Public Service Company used in connection with the manufacture, distribution and sale of gas within the City

of St. Cloud. That a resolution covering the employment of said Engineer was duly passed and adopted by said City Commission on the 14th day of December, 1920. That on said date, a duly certified copy of said resolution was served upon the executive officer or officers of the complainant, and request was made for 104 access to the books, records and papers of said complainant

for the purpose of ascertaining and securing necessary information covering the cost of said plant and equipment used in connection with the manufacture, distribution and sale of gas within the City of St. Cloud. That application was made for said information by said Valuation Engineer, and also by one Sylvester J. Hunt, an expert accountant of the firm of Bishop, Brissman & Co., certified public accountants, of St. Paul, Minnesota, with the result that said request for examination and securing of said information was refused, as more fully stated in the accompanying affidavits of said Louis P. Wolff and Sylvester J. Hunt.

That said defendant, upon the preliminary application for an injunction in this proceeding is unable to fully present its case in defense to said application until access to the said books and records of said complainant is allowed and permitted, either by complainant, or under the order of this Court. That certain statistical information has been submitted, as affiants are informed and believe, to the said Valuation Engineer, but that the same is wholly insufficient, and is fragmentary in character, and is not complete in substance or detail.

On information and belief, these affiants further state on oath, that the complain-t, in its public service business, consisting of its electric, gas and street car business, is making and securing an adequate return upon all of its capital investment. In proof and substantiation of said claim, affiants hereto attach a true copy of a written statement prepared by the complainant, covering the earnings of the complainant in its Public Service business, which copy is marked Exhibit "A," and which statement covers the earnings of the property of said complainant for the year ending September 30th, 1920, and which shows net earnings resulting from the business of the Company in the sum of \$280,549.97, an increase of approximately \$96,000.00 over the

net earnings of the complainant Company for the year ending 105 September 30th, 1919, as shown by Exhibit "B" hereto attached and made a part of this affidavit, which exhibit consists of a reproduced written statement of said complainant bearing date October 29th, 1919.

Affiants further state, that the complainant has never, during the term of office of affiants, submitted for consideration or revision the rates for electric service in the City of St. Cloud. That repeated increases have been made in said power rates, as is more fully shown by the affidavits of power consumers herewith submitted to the Court. That all of the increases made from time to time in electric power rates have been made without consultation with the City Commission, and have been entirely the separate action of the complainant, so far as these affiants are advised.

That during the War, a surcharge was placed on electric light rates in the City of St. Cloud. That recently said surcharge was removed,

and the light rates for residence, store and office purposes was increased in the amount of the former surcharge, with the exception that said former rates remained in existence for quantities of current consumed for lighting above 200 K. W. H.

That the rates now, and since September 1, 1920, in force in the City of St. Cloud for current for residence and business house lighting are as follows:

First	100 K. W. H. per month	.115 ets.
Second	100 K. W. H. " "	.095 "
Next	300 K. W. H. " "	.065 "
Above	500 K. W. H. " "	.055 "

subject to a discount per K. W. H. if paid on or before the 10th day of the month next following.

That the electric power rates now in force in the said City of St. Cloud, and which have been in force since September 1, 1920, are as follows:

106

First	3,000 K. W. H.	.05888	per K. W. H.	Net .053
Next	2,000 "	.05555	" "	.051
Next	5,000 "	.05333	" "	.048
Above	10,000 "	.051666	" "	.0465

That in some instances, in cases of small power users, a flat rate, subject to discount for prompt payment, has, since November 1, 1919, been in force, which rate amounts to the sum of .0666 per H. W. H., with no reductions for quantities used.

Also effective December 1, 1919, when the surcharge of ten per cent for power rates went off, the complainant, in reading its meters for a monumental plant and for a quarry operated by the same concern, did not consolidate the readings, but billed out separately said readings, with the result that complainant secured a higher rate based on said separate readings and the consummation of current in said establishments so operated by the same concern.

These affiants further state on oath, that in connection with the application of the said complainant to the City Commission of the City of St. Cloud, on or about the 31st day of August, 1920, the said complainant presented its petition, substantially in the form as attached to the amended Bill of Complaint herein, petitioning the said City Commission of defendant to prescribe a rate for gas to be paid by the inhabitants of the said City of St. Cloud amounting to a large increase over the rate prescribed as the maximum rate in the franchise ordinance referred to in the Bill of Complaint in this action. That due to the fact that the complainant and its predecessor in interest, The Public Service Company, had been operating under said franchise ordinance containing said maximum rate of \$1.35 per thousand cubic feet for fuel gas for the period of nearly fifteen years, during practically all of which time said maximum rate of \$1.35 per

thousand cubic feet was in force, that the said City Commission of the City of St. Cloud had no alternative but to return said petition to the said complainant and petitioner, with the statement that it could not entertain said petition, and that it adhered to the contract.

Affiants further state, that the records of the meetings of the 107 Common Council of the City of St. Cloud, held in the month of December, 1905, affirmatively show that said complainant by its attorney, urged and advocated the passage of franchise ordinance No. 160 referred to in the amended bill of complaint herein, as more fully shown in the affidavit of A. W. Buckman, City Clerk of the said City of St. Cloud, herewith submitted to the Court.

Affiants further state, that extensive publicity in the daily newspapers of the said City of St. Cloud was given by Mr. A. G. Whitney, President of The Public Service Company, during the month of December, 1905, and that the inducement for the passage of said Ordinance No. 160 by the Common Council of the City of St. Cloud, was the promise and agreement of said applicant, The Public Service Company, to construct and complete a gas plant within said City of St. Cloud within the terms stated in the ordinance, and to furnish illuminating gas and fuel gas service at the respective maximum rates prescribed in said ordinance. That said published article or articles are more fully covered in affidavits of publishers herewith submitted to the Court.

Affiants further state, that said St. Cloud Public Service Company has inserted newspaper advertisements in the newspapers of the City of St. Cloud covering the said proposed gas rate of \$3.39 per thousand cubic feet for fuel gas sought by it upon its complaint and verified showing embodied in its bill of complaint and amended bill of complaint, and affidavits presented to the Court. That Exhibits "C" and "D," which are attached to and made a part of this affidavit, are the public advertisements, addressed to the Gas Consumers of St. Cloud, which appeared, respectively, in the St. Cloud Daily Journal-Press and the St. Cloud Daily Times, printed and published, and given wide circulation, in the City of St. Cloud by said respective news-

papers, on the 14th day of January, 1921.

108 Affiants further state, that there is no Public Utilities Commission in the State of Minnesota having jurisdiction over any department of said complainant's public utility business, and that it would be unfair and unjust, even though the City were overruled in its legal contention that there is a contractual ordinance covering the maximum fuel gas rates within the City of St. Cloud, for said contract rate to be raised to the profit of complainant without there being submitted to the Court a clear and specific showing that the said complainant is not receiving returns upon its capital investment in its electric, street car and gas business. In that behalf affiants state, based on said statements of net earnings, based on a large increase of rates for electric service, producing more than an average of net profits, shown in said statement Exhibit "A," and upon rapidly reducing costs of coal and other supplies, and labor, that it would be unfair to increase any of the rates of said complainant company with-

out a full and complete showing that said Company was not deriving a profit and return upon its capital investment.

Further affiants say not.

WILLIAM W. MATSON.  
JULIUS ADAMS.  
HENRY MAYBURY.

Subscribed and sworn to before me this 21st day of January, 1921.

[SEAL.]

MARIE THILL,

*Notary Public, Stearns County, Minn.*

My Commission Expires June 25, 1922.

109

#### EXHIBIT "A."

#### St. Cloud Public Service Company.

*First Mortgage Sinking Fund Gold Bonds, Yielding 8 Per Cent.*

Dated November 1, 1914. Due November 1, 1934.

Bearing, at holder's option, either first mortgage 6% coupons, and 2% additional coupons secured by indenture, or Trustee's 8% coupons issued thereon.

Interest payable May and November 1st in Chicago or New York. Subject to redemption on any interest date at 104 and interest on or before November 1, 1925; at 103 and interest thereafter. Coupon bonds registerable as to principal. Denominations \$1,000, \$500 and \$100.

Chicago Trust Company and Lucius Teter, Trustee.

The Company Pays the Normal Federal Income Tax Not to Exceed Two Per Cent.

#### *Capitalization.*

	Authorized.	Outstanding.
Common stock .....	\$1,000,000	\$1,000,000
Second preferred stock.....	300,000	250,000
First preferred stock.....	700,000	253,400
First mortgage bonds.....	4,000,000	*2,094,000

The unissued balance of First Mortgage Bonds may be issued only under conservative restrictions in the Trust Deed.

The St. Cloud Public Service Company owns and operates under favorable franchises, the gas, electric light and power, and street railway business in St. Cloud, Minnesota, and furnishes from its central plant by means of over 225 miles of transmission lines, electric light and power to Sauk Rapids, Monticello, Cold Springs, Rich-

\*Of these bonds \$42,200 are held in the sinking fund.

mond, Albany, Foley, Waite Park, and twenty-five other nearby towns. Through associated companies electric service is given twenty-one additional towns, making the total population served over 50,000.

From our own personal investigations, from the reports of our experts, and from the President's letter contained within, we summarize the essential features of this issue as follows:

First Mortgage on entire public utility business in a remarkably prosperous and growing city and surrounding territory, the population served being over 50,000 people.

Net earnings over twice interest charges.

Large equity in physical property over and above the bonded indebtedness.

110 The company operates under favorable franchises in all the territory served.

The company has under ninety-nine year lease the entire property and water power of the St. Cloud Water Power Company, thus assuring the Public Service Company a continuous supply of cheap power. The company also has its own steam plant.

For the past twenty years the property has been owned and operated by same local interests of the very highest standing in the community.

A sinking fund equal to 5% of the gross earnings for the preceding year operates annually on May first until the maturity of the bonds. This sinking fund is cumulative and should retire a large portion of the bonds before maturity.

Price on Application.

ELSTON AND COMPANY,  
*Investment Securities.*

First Wisconsin Bank Building, Milwaukee.

Telephone Broadway 5570.

71 West Monroe Street, Chicago.

Telephone State 6440.

McKnight Building, Minneapolis.

Tel. Main 1509.

The statements herein made are summarized from reports and other information we believe to be entirely reliable, bring the data upon which we have acted in purchasing these securities for our own account.

St. Cloud, Minnesota, October 29, 1920.

Chicago Trust Company,  
Elston & Company,  
Chicago, Illinois.

GENTLEMEN :

In accordance with your request, I take pleasure in giving you the following information with regard to the St. Cloud Public Service Company, and its First Mortgage Twenty-Year Gold Bonds.

## Capitalization.

	Authorized.	Outstanding.
Common stock .....	\$1,000,000	\$1,000,000
Second preferred stock.....	300,000	250,000
First preferred stock.....	700,000	253,400
First mortgage bonds.....	4,000,000	2,094,000

111 The unissued balance of the first mortgage bonds may be issued for 80% of the actual cost of permanent additions and improvements, and then only when the net earnings for the preceding twelve months have been at least twice the first mortgage interest charges on all bonds outstanding, including those proposed to be issued.

## Earnings.

The earnings of this property for the year ending September 30, 1920, were as follows:

Gross Earnings .....	\$603,358.68
Operating expenses, Maintenance, Taxes, etc. ....	322,808.71
Net Earnings .....	\$280,549.97
*Interest on \$2,094,000 First 6's. ....	125,640.00
Balance .....	\$154,909.97
Two per cent additional interest on \$223,500 First 6's. ....	4,470.00
	<hr/>
	\$150,439.97

It will be seen that the net earnings are in excess of twice the interest charges on all of these first mortgage bonds outstanding. These earnings are increasing quite rapidly and a conservative estimate for the year 1921 places them in excess of \$330,000. An idea of the growth of our business may be gathered from the following comparison:

Gross Earnings for Year Ending December 31, 1912..	\$141,416.61
Gross Earnings for Year Ending December 31, 1914..	183,377.58
Gross Earnings for Year Ending December 31, 1916..	283,424.03
Gross Earnings for Year Ending December 31, 1918..	323,722.99
Gross Earnings for Year Ending September 30, 1920..	603,358.68

## Territory Served.

These bonds are secured by an absolute first mortgage on the gas, electric light and power, and street railway properties in St. Cloud, Minnesota, with a present population of over 16,000 people, and on the electric light and power properties in thirty-two nearby towns

\*Of these bonds \$42,200 are held in the sinking fund.

making an aggregate population served of 34,000. Among the most important towns served are the following: Sauk Rapids, Monticello, Cold Springs, Richmond, Albany, Foley, and Waite Park, Minnesota. An additional 16,000 people are served with power through associated companies, making a total population on the Company's lines of over 50,000. The Company has over 225 miles of modern, high tension transmission lines, fully equipped with substations and transformers.

St. Cloud is located on the main transcontinental lines of the Great Northern and Northern Pacific Railway systems, sixty-five miles northwest of Minneapolis and St. Paul in the middle of a rich farming country and in the heart of the quarrying district of the northwest. The city is the county seat of Stearns County and according to the last census is the fifth largest city in the State.

112 The Minnesota State Reformatory is located at St. Cloud, and also the State Normal School. St. Cloud has seven banks with about \$8,500,000 deposits; two daily newspapers, four weeklies; two large foundries, a woolen mill, drop forge plant, automobile factory, two brick yards and various other miscellaneous industries. A new hotel is in the course of construction at a cost of \$500,000. A new high school has recently been completed at a cost of \$250,000, and in the past sixteen months \$1,000,000 has been put into public improvements, including sewers, paving and additions to the water supply.

#### Lease of the St. Cloud Water Power Company.

The St. Cloud Public Service Company has taken over and operates under an absolute 99-year lease the entire property of the St. Cloud Water Power Company located at St. Cloud. This assures the St. Cloud Public Service Company of the entire supply of all the power available from the Mississippi River at this point (i. e., about 7,500 h. p.), at a rate actually below its real value and for a great deal less than it could be manufactured for independently. This lease covers all of the St. Cloud Water Company's properties, including its dam, canal, head gates, tail races, hydro-electric plant, with all its tools, machinery, etc. The rental paid for this property is \$36,000 per annum, which rental may never be increased except with the consent of the Trustee for the St. Cloud Public Service Company first mortgage bonds now being sold, and then only under conditions which absolutely first protect the bondholders of that issue.

#### Plant and Equipment.

The St. Cloud Public Service Company has in operation at the present time operated by water power 2,300 K. W., 1,150 K. W. which is operated under the lease of the St. Cloud Water Company, and 1,150 K. W. is the property of the St. Cloud Public Service Company. In addition, the Company owns a practically new and complete steam plant, consisting of turbines of 4,800 K. W. capacity, of which 3,000 K. W. of the very latest type has just been installed and put in operation in October, 1920. In the heart of St.

Cloud the St. Cloud Public Service Company also owns a steam plant with 400 H. P. boilers with the necessary engines, generators, etc., which is kept as an emergency plant. At this latter point is also located our gas plant, which is of modern construction throughout and consisting of two benches with the necessary apparatus, including two holders and five-foot water gas set.

The street railway line, in addition to giving service to St. Cloud, connects with Sauk Rapids and Waite Park, and a part of the outlying quarry district, and also supplies service to the Great Northern Shops, which are located outside the city limits. An increase in rates went into effect six weeks ago, which makes the Company's rates very satisfactory and this *this* department is making a very good showing in net earnings.

113

### Value of Property.

Based on reports of engineers the reduplication value of our property including actual cost of additions and improvements made within the last twelve months, but exclusive of good-will or franchises, is over \$4,000,000. As a going concern with its large possibilities, I believe a conservative estimate of the property's value to be considerably in excess of this amount.

### Franchises.

We have broad and liberal franchises in all the territories served. The franchise in St. Cloud was granted in December, 1905, for a period of thirty years, and is favorable in every way.

### Sinking Fund.

The trust deed securing these bonds provides for a cumulative sinking fund beginning May 1, 1919, amounting to 5% of the gross earnings for the preceding calendar year. This sinking fund must be invested in the bonds of this issue, and the bonds so purchased are kept alive, and the interest on them is cumulative, accruing to the benefit of the sinking fund.

### Future.

The public utility business in and around St. Cloud is capable of tremendous growth. The increase in our gross income between January 1, 1913, and September 30, 1920, was over 320%. Farmers are building their own farm lines to our substations, and the Company is getting this additional load with its earnings without increasing its investment at a large number of its substations.

All the power that comes to our steam plant is contracted for with coal clauses, so that the increase in the price of coal does not make any difference in the net earnings. The Company has a contract whereby the Watab Pulp and Paper Company agrees to use all the

excess power of the St. Cloud Public Service Company with a minimum payment of \$7,500 per annum.

Practically all of the stock of the St. Cloud Public Service Company is owned in St. Cloud, and the writer has been at the head of those properties for the past twenty years.

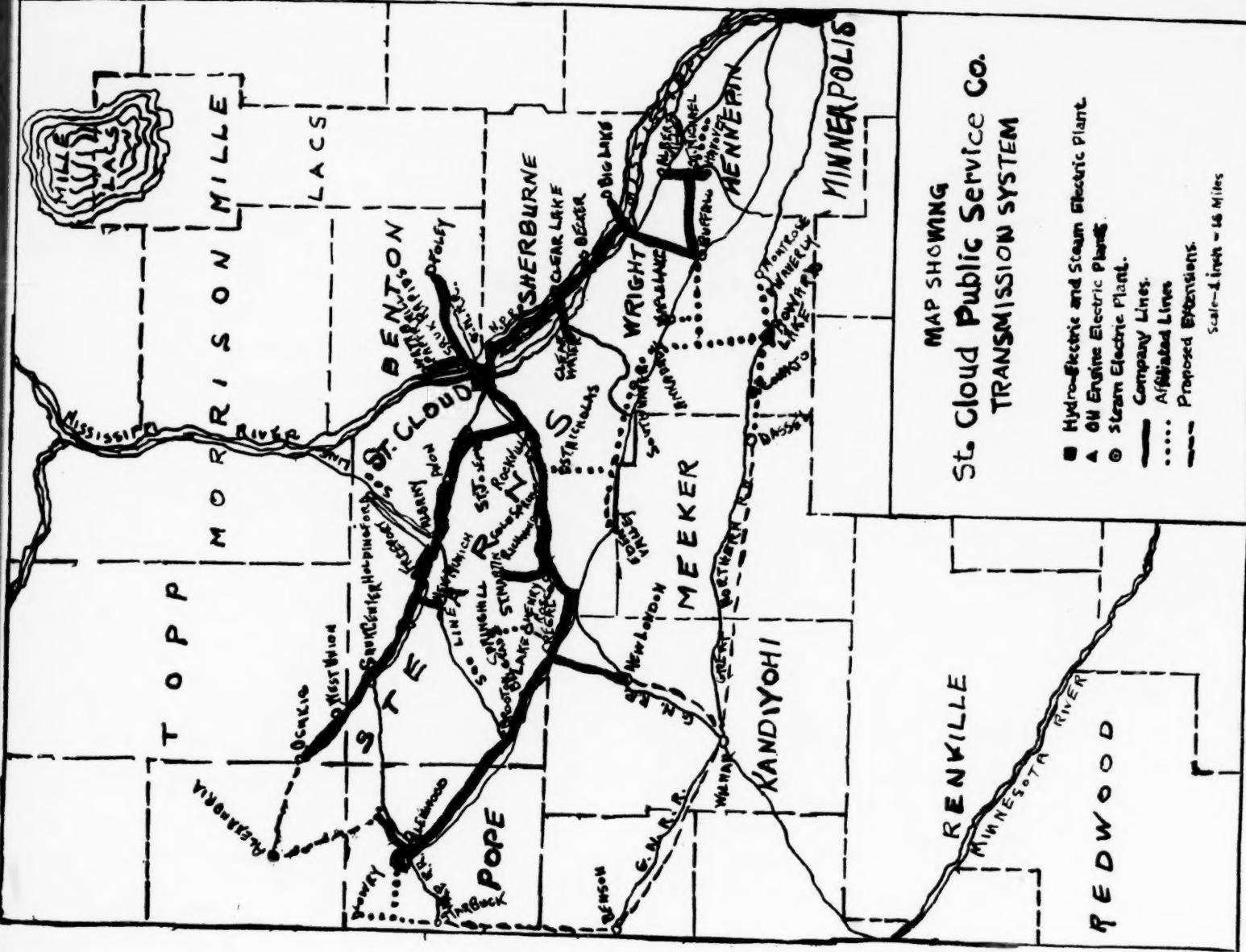
Yours very truly,

(Signed)

ST. CLOUD PUBLIC SERVICE  
COMPANY,  
A. G. WHITNEY,  
*President.*

(Here follows map showing St. Cloud Public Service Co. transmission system, marked page 114.)





114

No 472 } St Cloud Public Service Co + City of St Cloud p 114

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115

## EXHIBIT "B."

St. Cloud Public Service Company.

*First Mortgage 6% Twenty-year Gold Bonds.*

Dated November 1, 1914. Due November 1, 1934.

Interest payable May and November 1st in Chicago or New York. Subject to redemption on any interest date at 105 and interest and interest on or before November 1, 1920; at 104 and interest on or before November 1, 1925; at 103 and interest thereafter. Coupon bonds registerable as to principal.

Denominations \$1,000, \$500.00 and \$100.

Chicago Trust Company and Lucius Teter, Trustees.

The Company Pays the Normal Federal Income Tax Not to Exceed Two Per Cent.

*Capitalization.*

	Authorized.	Outstanding.
Common Stock .....	\$1,000,000	\$1,000,000
Second Preferred Stock .....	300,000	212,000
First Preferred Stock .....	700,000	184,700
First Mortgage Bonds .....	4,000,000	1,600,000

The unissued balance of First Mortgage Bonds may be issued only under conservative restrictions in the Trust Deed.

The St. Cloud Public Service Company owns and operates under favorable franchises, the gas, electric light and power, and street railway business in St. Cloud, Minnesota, and furnishes from its central plant by means of over 200 miles of transmission lines, electric light and power to Sauk Rapids, Monticello, Cold Springs, Richmond, Albany, Foley, Waite Park, and twenty-three other nearby towns. Through associated companies electric service is given to seventeen additional towns, making the total population served, over 50,000.

From our own personal investigations, from the reports of our experts, and from the President's letter contained within, we summarize the essential features of this issue as follows:

First mortgage on entire public utility business in a remarkably prosperous and growing city and surrounding territory, the population served being over 50,000 people.

Net earnings over twice interest charges.

Large equity in physical property over and above the bonded indebtedness.

The company operates under favorable franchises in all the territory served.

The company has under ninety-nine year lease the entire property and water power of the St. Cloud Water Power Company, thus assuring the Public Service Company a continuous supply of cheap power. The company also has its own steam plant.

For the past nineteen years the property owned and operated by same local interests of the very highest standing in the community.

A sinking fund equal to 5% of the gross earnings for the preceding year operates annually on May first until the maturity of the bonds. This sinking fund is cumulative and should retire a large portion of the bonds before maturity.

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Price on Application.

Bond Department.

Chicago Trust Company,

Former Name

Chicago Savings Bank and Trust Company,

State and Madison Streets,

Chicago.

St. Cloud, Minnesota, October 29, 1919.

Chicago Trust Company,  
Elston & Company,  
Chicago, Illinois.

GENTLEMEN:

In accordance with your request, I take pleasure in giving you the following information with regard to the St. Cloud Public Service Company, and its First Mortgage 6% Gold Bonds:

## Capitalization.

	Authorized.	Outstanding.
Common stock.....	\$1,000,000	\$1,000,000
Second Preferred Stock.....	300,000	212,000
First Preferred Stock.....	700,000	184,700
First Mortgage Bonds.....	4,000,000	1,600,000

The unissued balance of the first mortgage bonds may be issued for 80% of the actual cost of permanent additions and improvements, and then only when the net earnings for the preceding twelve months have been at least twice the interest charges on all bonds outstanding, including those proposed to be issued.

## Earnings.

The earnings of this property for the year ending September 30, 1919, were as follows:

Gross Earnings.....	\$422,960.60
Operating Expenses, Maintenance, Taxes, etc.....	228,764.03
Net Earnings .....	\$194,196.57
Interest on \$1,600,000 First 6s.....	96,000.00
Surplus .....	98,196.57

It will be seen that the net earnings are in excess of twice the interest charges on all of these first mortgage bonds outstanding and this is without taking into consideration earnings from additions and improvements for which these additional bonds are being issued. These earnings are increasing quite rapidly and a conservative estimate for the year 1920 places them in excess of \$225,000. An idea of the growth of our business may be gathered from the following comparison:

Gross Earnings for Year Ending December 31, 1912..	\$141,416.61
Gross Earnings for Year Ending December 31, 1914..	183,377.58
Gross Earnings for Year Ending December 31, 1916..	283,424.03
Gross Earnings for Year Ending December 31, 1918..	323,722.99
Gross Earnings for Year Ending September 30, 1919	422,960.60

These bonds are secured by an absolute first mortgage on the gas, electric light and power, and street railway properties in St. Cloud, Minnesota, with a present population of over 16,000 people, and on the electric light and power properties in thirty nearby towns making an aggregate population served of 34,000. Among the most important towns served are the following: Sauk Rapids, Monticello, Cold Springs, Richmond, Albany, Foley, and Waite Park, Minnesota. An addition- 16,000 people are served with power through associated companies, making a total population on the Company's lines of over 50,000. The Company has over 200 miles of modern, high tension transmission lines, fully equipped with substations and transformers and has under construction 71 additional miles which are expected to be completed early in December.

St. Cloud is located on the main transcontinental lines of the Great Northern and Northern Pacific Railway systems, sixty-five miles northwest of Minneapolis and St. Paul in the middle of a rich farming country and in the heart of the quarrying district of the northwest. The city is the county seat of Stearns County and according to the last census is the fifth largest city in the State. St. Cloud is a particularly prosperous city and has shown a very steady growth for many years. There has been an average of about 200 new buildings erected in this city each year for the last ten years.

The growth is healthy and shows every sign of continuing in the future. The Great Northern Railway Company has located its shops at St. Cloud and at the present time employs about 1,100 men.

This district is the center of the rapidly growing granite and quarrying industry and St. Cloud is conceded to be either the second or third city in the United States in this industry. There are about thirty-five quarries open and in use here at the present time and new concerns are continually opening up in this line of business. Practically all of these are electrically operated by power from the St. Cloud Public Service Company.

The Minnesota State Reformatory is located at St. Cloud, and also the State Normal School. St. Cloud has six banks with about \$8,200,000 of deposits; two daily newspapers; three weeklies; two large foundries; a woolen mill; two brick yards, and various other miscellaneous industries. A new hotel is in the course of construction at a cost of \$300,000. A new high school building has recently been completed at a cost of \$250,000, and additions and improvements to other school buildings are being made at a cost of over \$150,000. The city has nine miles of paving and contracts have been awarded for \$1,000,000 public improvements including sewers, paving and additions to the water supply.

#### Lease of the St. Cloud Water Power Company.

The St. Cloud Public Service Company has taken over and operates under an absolute 99 year lease the entire property of the St. Cloud Water Power Company located at St. Cloud. This assures the St. Cloud Public Service Company of the entire supply of all the power available from the Mississippi River at this point (i. e., about 7,500 h. P.) at a rate actually below its real value and for a great deal less than it could be manufactured for independently. This lease covers all of the St. Cloud Water Power Company's properties, including its dam, canal, head gates, tail races, hydro-electric plant, with all its tools, machinery, etc. The rental paid for this property is \$36,000 per annum, which rental may never be increased except with the consent of the Trustees for the St. Cloud Public Service Company first mortgage 6% bonds now being sold, and then only under conditions which absolutely first protect the bondholders of that issue.

The St. Cloud Public Service Company has in operation at the present time operated by water power, 2,300 k. w., 1,150 k. w. of which is operated under the lease of the St. Cloud Water Power Company, and 1,150 k. w. is the property of the St. Cloud Public Service Company. In addition the Public Service Company owns a practically new and complete steam plant consisting of turbines of 4,700 k. w. capacity of which 3,000 k. w. of the very latest type is just being installed. The entire equipment in connection with this plant, including boilers, pipes, fittings, pumps, etc., is of the best

and latest type and automatic stokers are being installed. The steam plant is laid out with foundations for other units of the same character with sufficient room for the installation of additional boilers and all other necessary apparatus. This plant is located adjacent to the hydro-electric station mentioned above, so that our power for the entire territory served is generated at one point. In the heart of St. Cloud, the St. Cloud Public Service Company also owns a steam power plant with 400 h. p. boilers with necessary engines, generators, etc., which is kept as an emergency plant. At this latter point is also located our gas plant which is of modern construction throughout, consisting of two benches with the necessary apparatus including two holders and a new five foot water gas set.

The street railway line in addition to giving service to St. Cloud, connects with Sauk Rapids and Waite Park, and a part of the outlying quarrying district, and also supplies service to the Great Northern shops, which are located outside the city limits. Satisfactory rates are in effect and this department is making a good showing in net earnings.

#### Value of Property.

Based on reports of engineers the reduplication value of our property, exclusive of good-will or franchises is over \$3,000,000. As a going concern with its large possibilities, I believe a conservative estimate of the property's value to be considerably in excess of this amount.

#### Franchises and City Contracts.

We have broad and liberal franchises in all the territories served. The franchise in St. Cloud was granted in December 1905, for a period of thirty years, thus extending over one year beyond the maturity of these bonds, and is favorable in every way. We have contracts with St. Cloud covering the street lighting and pumping of the city water. We also have lighting contracts with Sauk Rapids and the other outlying towns.

Our property has always been in good favor during the past nineteen years (during which time the present owners have managed it), and there has never been any litigation over our rates or our service. The Company has been granted increased rates for lighting and power in all towns and expects an increase in rates for gas shortly.

#### Sinking Fund.

The trust deed securing these bonds provides for a cumulative sinking fund beginning May 1, 1919, amounting to 5% of the gross earnings for the preceding calendar year. This sinking fund must be invested in the bonds of this issue, and the bonds so purchased are kept alive, and the interest on them is cumulative, accruing to the benefit of the sinking fund. This sinking fund will retire before maturity a large number of the bonds outstanding.

## Future of Property.

The public utility business in and around St. Cloud is capable of tremendous growth. The increase in our gross income between January 1, 1913 and January 1, 1919, was over 230%. During the year ending August 31, 1919, we added in St. Cloud, Sauk Rapids and Waite Park alone, 424 lighting and power customers, and 191 gas customers. By very slight additional investment in the gas property we expect to double our gas business during the coming two years. The Great Northern Railway shops, which are now customers of the Company, expect to use large additional amounts of power in the near future and the demand for power from our various industries, especially the granite industry, is increasing rapidly.

In addition to the present towns served we expect to take in several other cities and towns in this part of the state, with an additional population of nearly 10,000 people. All of these cities and towns will be connected to our central station at St. Cloud at a minimum investment for the business to be secured and will afford very attractive business for the St. Cloud Public Service Company.

A contract about to be entered into with the Watab Pulp and Paper Mills, just north of St. Cloud, will be of very great benefit to the Company. Under the terms of this contract, the Watab Pulp and Paper Company agrees to use all the excess power of the St. Cloud Public Service Company with a minimum payment of \$7,500 per annum.

## Ownership and Management.

Practically all of the stock of the St. Cloud Public Service Company is owned in St. Cloud, and the writer has been at the head of these properties for the past nineteen years. Although various offers have been made for these properties in the recent past the owners and managers have no intentions of disposing of their interests, as they have unlimited faith in the future of the entire territory.

Yours very truly,

ST. CLOUD PUBLIC SERVICE  
COMPANY,  
A. G. WHITNEY,  
*President.*

Delivery of bonds will be made at any bank, express prepaid, payable with exchange.

Telegrams may be sent at our expense.

This bank limits its purchases of securities to those which are considered suitable for the investment of its own funds, and sells only such securities to its clients.

All statements herein contained are based on information which the bank regards as reliable, being the data on which it has acted in its purchase and valuation of this issue, but for which it does not

EXHIBIT "C"

# To the Gas Consumers of St. Cloud

---

There has been considerable stress put on the rate of \$3.39 per thousand cu. ft. asked by the St. Cloud Public Service Company in the case now pending in the Federal Court.

First, the City Commission was asked to grant us a rate of \$2.25 per thousand cu. ft. Failing in this, our second request was that the gas rate be named sufficient to take care of the Company's actual cash investment in the Gas Department based upon the price of coal, coke and oil used in the manufacture of gas and to be adjusted every four months, the Company to stand the whole loss of its depreciation charges, but these rates to continue until at least a portion of the depreciation could be made up.

Should the Federal Court grant the Public Service Company a rate of \$3.39 per thousand cu. ft., the Company would not for one second put as high a rate as this into effect in the City of St. Cloud, but a rate that we are satisfied would be highly satisfactory to the gas consumers would be named.

EXHIBIT "D"

## To the Gas Consumers of St. Cloud

There has been considerable stress put on the rate of \$3.39 per thousand cu. ft. asked by the St. Cloud Public Service Company in the case now pending in the Federal Court.

First, the City Commission was asked to grant us a rate of \$2.25 per thousand cu. ft. Failing in this, our second request was that the gas rate be named sufficient to take care of the Company's actual cash investment in the Gas Department based upon the price of coal, coke and oil used in the manufacture of gas and to be adjusted every four months, the Company to stand the whole loss of its depreciation charges, but these rates to continue until at least a portion of the depreciation could be made up.

Should the Federal Court grant the Public Service Company a rate of \$3.39 per thousand cu. ft., the Company would not for one second put as high a rate as this into effect in the City of St. Cloud, but a rate that we are satisfied would be highly satisfactory to the gas consumers would be named.

## St. Cloud Public Service Company

A. G. WHITNEY, President

XXXXXXXXXXXXXXXXXXXX



assume responsibility. The bank extends to its clients the use of its facilities for the purchase and sale of bonds, whether such bonds are its own offerings or those of other houses, and will be glad to obtain for its clients, to the best of its ability, whatever information they may desire regarding investments.

BOND DEPARTMENT,  
CHICAGO TRUST COMPANY,  
State and Madison Streets, Chicago.

(Here follow Exhibits C and D, marked pages 120 and 121.)

122 United States District Court, District of Minnesota, Sixth Division.

ST. CLOUD PUBLIC SERVICE COMPANY, Complainant,  
vs.

CITY OF ST. CLOUD, Defendant.

*Affidavit of A. W. Buckman, City Clerk of the City of St. Cloud.*

STATE OF MINNESOTA,  
*County of Stearns, ss:*

A. W. Buckman, being first duly sworn, on oath deposes and says, that he is the duly appointed, qualified and acting City Clerk of the City of St. Cloud, Minnesota, defendant above named. As such Clerk, affiant has official custody of the official records of said City of St. Cloud. That included among said records are the official records of the various meetings of the Common Council of the City of St. Cloud, held in the month of December, 1905, covering the action of said Common Council of the City of St. Cloud in respect to the consideration, amendment, and final passage by said Common Council of Ordinance No. 160 of said City of St. Cloud, referred to in the Amended Bill of Complaint herein.

That said Ordinance No. 160 was introduced at a meeting of the Common Council of said City of St. Cloud, held on December 4th, 1905, as appears from the extract of the minutes of said Common Council, of said date, hereto attached, and marked Exhibit "A."

123 That said ordinance received consideration at the meeting of said Common Council of the City of St. Cloud, held on December 11, 1905, at which time, on motion duly adopted, G. W. Stewart was heard in regard to said ordinance.

That Exhibit "B" hereto attached and made a part of this affidavit, is an extract from the minutes of the meeting of said Common Council held on December 11, 1905.

That as appears from the minutes of the meeting of the Common Council, at its regular adjourned meeting held on December 18, 1905, the said Ordinance No. 160 was put upon its final passage, after having been amended, as appears from the extract of said

minutes of said meeting marked Exhibit "C," hereto attached and made a part of this affidavit.

Affiant further says, that said extracts of said minutes are true and correct copies of said portions of said minutes as appear from the original records in affiant's possession as City Clerk of said city.

Further affiant saith not.

A. W. BUCKMAN.

Subscribed and sworn to before me this 21st day of January, 1921.

[SEAL.]

MARIE THILL,  
Notary Public, Stearns County, Minn.

My Commission Expires June 25, 1922.

124

EXHIBIT "A."

*Extracts from Common Council Proceedings in December, 1905,  
Pertaining to Ordinance No. 160 Prior to Its Passage.*

Taken from Meeting of December 4th, 1905.

"Reports of Standing Committees."

"Alderman Stephens asked that he be given the unanimous consent of the Council to introduce an ordinance.

Alderman Schaefer moved that unanimous consent be given Alderman Stephens to introduce said ordinance.

Motion unanimously adopted.

Alderman Stephens introduced Ordinance No. 160, entitled 'An Ordinance granting the right to acquire, construct, maintain and operate works for the production, manufacture and sale of electricity and for the manufacture and sale of gas in the City of St. Cloud, Minnesota.'

Alderman Schmitt moved that the ordinance be referred to the committee on ordinances. Motion duly adopted."

125

EXHIBIT "B."

Taken from Meeting of December 11th, 1905.

"Reports of Standing Committees."

"Alderman Stephens, as chairman of the Committee on Ordinances, submitted Ordinance No. 160, which had been referred to said committee, and moved that it be given its first reading. Motion duly adopted.

On motion, duly adopted, Attorney G. W. Stewart was heard in regard to said ordinance.

Alderman Stephens moved that the ordinance be again referred to the committee on ordinances to report on at an adjourned meeting of the Council, to be held one week from tonight, Dec. 18, 1905, at 8 o'clock P. M., and that when the Council adjourn it be until said time.

Motion duly adopted.

## EXHIBIT "C."

Taken from Meeting of December 18th, 1905, Being a Regular  
Adjourned Meeting.

"The Council proceeded to take up the reports of the committee  
on ordinances.

## Ordinances.

Ald. Stephens, as chairman of the committee on ordinances, re-  
ported verbally that a majority of the committee recommended that  
ordinance No. 160, entitled 'An ordinance granting the right to  
acquire, construct, maintain and operate works for the production,  
manufacture and sale of electricity and for the manufacture and  
sale of gas in the City of St. Cloud, Minnesota,' be given its second  
reading and moved that the Council give their unanimous  
126 consent to the ordinance receiving its second reading and  
being placed on its final passage.

Motion unanimously adopted.

Ordinance received its second reading section by section.

Ald. Schaefer moved that section 3 be amended by inserting the  
words 'twenty-four hours' in lieu of the words 'five days.'

Motion duly adopted.

Ald. Stephens moved that Section 6 be amended by inserting the  
words 'not to exceed' after the words 'price of' and also after the  
words 'rate of.'

Motion duly adopted.

Ordinance read as amended.

On the chair putting the question 'shall this ordinance pass?' the  
same was passed on roll call by the following vote:

Ayes: Ald. Doyle, Kaufman, Kost, Schaefer, Schmitt, Smith,  
Spaniol, Steckling, Stephens and President McCarty—10.

Nays: None."

Filed in U. S. District Court January 22, 1921.

127 United States District Court, District of Minnesota, Sixth  
Division.

ST. CLOUD PUBLIC SERVICE COMPANY, Complainant,

vs.

CITY OF ST. CLOUD, Defendant.

*Affidavit of Alvah Eastman.*

STATE OF MINNESOTA,  
*County of Stearns, ss:*

Alvah Eastman, being first duly sworn on oath, deposes and says,  
that he is the President of the Journal-Press Company, owner and

proprietor of the St. Cloud Daily Journal-Press, a newspaper publication printed and published in the City of St. Cloud, and which has been printed and published therein for more than twenty years last past.

That the said Daily Journal-Press Company has preserved its files of all of its newspaper publications covering the year 1905. That upon reference to the files of said newspaper, affiant states that Exhibits "A", "B" and "C" hereto attached and made a part of this affidavit, are articles appearing in the said newspaper publication, in the issues of said paper of December 5th, 1905, December 12, 1905, and December 19, 1905, respectively. That said newspaper at said time referred to last above had an extensive circulation among the people of the said City of St. Cloud.

Further affiant saith not.

ALVAH EASTMAN.

Subscribed and sworn to before me this 21st day of January, 1921.  
[SEAL.]

MARIE THILL,  
*Notary Public, Stearns County, Minn.*

My commission expires June 25, 1922.

128

EXHIBIT "A."

*Extract from the Daily Journal-Press, St. Cloud, Minn., Tuesday, December 5, 1905.*

Will Build a Big Gas Plant.

A. G. Whitney Outlines His Latest Scheme to Help the City.

\$65,000 to be Expended in a Big Plant, Work on Which Will be Commenced in January.

St. Cloud is to have a first class and modern gas plant for fuel, lighting, heat and power. It will have a capacity large enough to supply a city of 25,000 people. It will be built by the Public Service Company, of which A. G. Whitney is president, and he has given his personal attention to this matter for some time past. He has faith in the prosperity and growth of the city, of which he is a most important factor. The plans for the plant are well under way, and two Chicago experts have figured on the cost, one making it \$60,000 and the other \$65,000. It will be located on Fifth Avenue north, beside the street car barns and steam plant of the city. Between six and ten miles of mains will be laid the coming summer. It is expected to have the plant ready as soon as the frost is out of the ground to permit of putting down of the mains.

The price will be \$1.35 per 1,000 feet for fuel, and \$1.85 for illuminating gas, with ten cents per 1,000 feet discount for prompt payment of bills—which brings the price for fuel gas to \$1.25. The price in the big cities of St. Paul and Minneapolis is \$1.30, with 20 cents dis-

count, so that the proposed price is very reasonable. In fact, an examination of the gas franchises of most of the cities of the northwest failed to find a lower initial price than \$2.50 per 1,000 cubic feet.

Mr. Whitney has made the price this low, because he believes the only way to make it a success is to make its use general, and by making it in large quantities reduce the expense to the lowest cost. The increased cost of fuel, and the further fact that the paper mill at Watab will hereafter use all the wood output of the Sauk Rapids mill, which has been used by St. Cloud people as kitchen fuel, makes the manufacturing of gas for fuel most opportune. Mr. Whitney positively asserts that at the prices named he can save every householder money, and its great convenience in the kitchen will undoubtedly make its use very general.

The present gas franchise is perpetual, while the one covered by the ordinance now before the council runs for only 30 years.

The gas will be made from the best grade of Pennsylvania soft coal, and it will make a product that is first class.

The expenditure of \$65,000 during the coming winter months will help some, and it is but one step in helping making a modern city of St. Cloud that Mr. Whitney has under way. The building of the Sauk Rapids dam and the establishment of manufacturing concerns that will employ much labor will give this city a growth that will in a short time justify Mr. Whitney's company in building so costly a gas plant and which is much needed.

## EXHIBIT "B."

The Daily Journal-Press, Tuesday, December 12, 1905.

Adjourned to Meet Again.

Gas Ordinance is Passed Over to Committee on Ordinances.

Talked to Mayor and Police.

The city fathers refused to pass on the ordinance granting the right to the Public Service Company to operate a gas plant in the city, and the conservative aldermen decided to pass the matter over to the committee on ordinances and have that committee report on the subject at an adjourned meeting of the council, set for next Tuesday.

Attorney G. W. Stewart appeared before the council and explained why it was imperative to the promoters of the enterprise that the ordinance be granted this month, as the Public Service Company wants to commence work on the plant the first of the year. The stipulation as to time was made very plain last night to the members of the council, and it is likely that at the next meeting of the council a week from now there will be no objection to the passing of the ordinance.

The ordinance, as already stated in the Journal-Press, asks for right to acquire, construct, maintain and operate works for the production, manufacture and sale of electricity, and for the manufacture

and sale of gas in the City of St. Cloud. The main points of interest in the ordinance are the facts that the ordinance asks for a 30-year grant, that the plant is to be finished before Jan. 1, 1907, and that the price of the gas is not to exceed \$1.85 on illuminating gas and \$1.35 on fuel gas per thousand cubic feet. Up to the time the plant is in order the company promises to furnish gas from the present gas works at the same price. The city is to have a right to buy the plant Jan. 1, 1911, or at five-year intervals after that time.

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## EXHIBIT "C."

Daily Journal-Press, Tuesday, December 19, 1905.

Council Passed Gas Ordinance.

St. Cloud Will Have Light and Fuel Plant by January 1, 1907.

\* \* \* \* \*

It did not take the council last night long to dispose of the gas ordinance. It was passed by a unanimous vote of the city fathers present, and if all goes well, the Public Service Company will have a gas fuel and lighting plant ready for manufacture, distribution and sale of gas by the first day of January, 1907.

The ordinance committee had not had time to investigate the ordinance in a body, and sent a written report to the council meeting. The members of the committee did the next best thing, read it over carefully each by his own fire side, and all the members present were in favor of its passing. Alderman Stephens recommended that the ordinance be re-read. City Clerk Limperich did this and in the course of the reading, section by section was passed over with few alterations. It was recommended, moved and passed that Section 3, which read in part that "all damages done by such excavations (for mains and service connections in streets, alleys, sidewalks and public places) shall be repaired by such grantee, and in case any obstructions caused by such excavations shall remain longer than five days after notice to remove same \* \* \* the said city may remove or protect the same at the cost of said grantee", should be changed so that the time for moving was fixed at 24 hours after notice of city. Alderman John Schaefer fathered the motion. It was the most important change in the ordinance.

Alderman Schmitt moved that an alteration be made in the clause referring to the cost of the gas, which reads that "grantee is \* \* \* authorized to sell illuminating gas \* \* \* at the price of one and 85-100 dollars and fuel gas at the rate of one and 35-100 dollars". By his motion the words "not to exceed" are inserted before the price of each gas.

These were the only alterations made and the ordinance was passed by sections with a unanimous vote.

\* \* \* \* \*

Filed in U. S. District Court January 22, 1921.

131 United States District Court, District of Minnesota, Sixth  
Division.

ST. CLOUD PUBLIC SERVICE COMPANY, Complainant,  
vs.

CITY OF ST. CLOUD, Defendant.

*Affidavit of A. A. Wright.*

STATE OF MINNESOTA,  
*County of Stearns, ss:*

A. A. Wright, being first duly sworn, deposes and says, that he has for and during twenty-five years last past, been a resident and property owner in the City of St. Cloud; that he is now, and for some years past has been, engaged in the real estate business in the City of St. Cloud, and that he is familiar with real estate values in said City of St. Cloud.

That he is familiar with the location and value of Lots Nine (9) and Ten(10) in Block Four (4), in the Town (now City) of St. Cloud, John L. Wilson Survey, upon which lots there is located the complainant's gas works and a part of its electrical establishment. That in the judgment and opinion of affiant, the present value of said real estate is the sum of Seven thousand five hundred Dollars (\$7,500.00), and which amount represents the fair market value of said land, exclusive of improvements.

A. A. WRIGHT.

Subscribed and sworn to before me this 21st day of January, 1921.

[SEAL.]

MARIE THILL,  
*Notary Public, Stearns County, Minn.*

My Commission expires June 25th, 1922.

Filed in U. S. District Court January 22, 1921.

132 United States District Court, District of Minnesota, Sixth Division.

ST. CLOUD PUBLIC SERVICE COMPANY, Complainant,

vs.

CITY OF ST. CLOUD, Defendant.

*Affidavit of Henry P. Steckling, Christ Schmitt, and Peter Spaniol.*

STATE OF MINNESOTA,  
County of Stearns, ss:

Henry P. Steckling, Christ Schmitt and Peter Spaniol, being first duly sworn, depose and say, each for himself, that he is a resident of the City of St. Cloud, and has resided therein for more than fifteen years last past. That he was a member of the Common Council of the City of St. Cloud, serving as an alderman of the city, and that he attended the regular monthly meeting of said Common Council of the City of St. Cloud, which was held at the City Hall, on December 4th, 1905, and also the regular adjourned meeting of said Common Council which was held at the same place, on December 11th, 1905, and that each of said affiants was present at the regular adjourned meeting of said Common Council on December 18th, 1905, at which time Ordinance No. 160 received its second reading, section by section, was amended in manner as shown by the original records, and was placed upon its final passage, and was passed on roll call, as shown by the records, each of these affiants voting for the passage of the ordinance, there being a unanimous vote of all members present therefor.

Affiant states, that his recollection is that there was considerable opposition to the passage of said ordinance in its original form.

That on the occasion of the meeting of December 11, 1905, 133 Attorney George W. Stewart, of the City of St. Cloud, appearing for and representing the Public Service Company, was heard in regard to said ordinance and advocated the passage of said ordinance as the representative of said company, explaining that it was imperative to the promoters of the enterprise that the ordinance be granted during the month of December, 1905, as the Public Service Company desired to commence work on the gas plant during the first of the year 1906. That said Stewart spoke at considerable length urging the early passage of said ordinance No. 160. That it was well known and understood at the time that said Attorney George W. Stewart was representing the interests of said Public Service Company the grantee of said ordinance and was the spokesman for said Public Service Company, and that the explanations made by him to the Council materially aided in the final passage of Ordinance No. 160. That affiant understood the fact to be that said Ordinance had been prepared by or at the request of, said Public Service Company, and that affiant's understanding of the ordinance at the time was that, in consideration of the granting of

the rights covered by the ordinance, the Company agreed to construct and complete said gas plant, and thereafter furnish service at not exceeding the rates stipulated in the ordinance.

Affiant Henry P. Steckling, separately avers, that prior to the final passage of said ordinance, that Mr. A. G. Whitney, President of said Public Service Company personally interviewed affiant and requested affiant to support said ordinance No. 160, and to vote for the same on final passage in order to enable the Company to proceed with its gas plant operations, concerning which the Public Service Company, on the day following the introduction of Ordinance 134 No. 160, gave, through the newspapers of the City of St. Cloud, general publicity concerning its plans covering gas works, and referring in said publicity matter to the ordinance then before the Council for consideration.

HENRY P. STECKLING.  
CHRIST SCHMITT.  
PETER SPANIOL.

Subscribed and sworn to before me this 14th day of January, 1921.

[SEAL.]

MARIE THILL.

*Notary Public, Stearns County, Minn.*

My Commission expires June 25th, 1922.

Filed in U. S. District Court January 22, 1921.

135 United States District Court, District of Minnesota, Sixth Division.

ST. CLOUD PUBLIC SERVICE COMPANY, Complainant,

vs.

CITY OF ST. CLOUD, Defendant.

*Affidavit of Sylvester J. Hunt.*

STATE OF MINNESOTA,

*County of Ramsey, ss:*

Sylvester J. Hunt, being first duly sworn, deposes and says that he is thirty years of age and resides in the City of St. Paul, Minnesota. That he is an experienced accountant and has been engaged in accounting work for about twelve years past and that he is at present employed as an expert accountant by the firm of Bishop, Brissman & Co., certified public accountants, of St. Paul, Minnesota.

That said firm was employed by the City of St. Cloud to make an examination of the books of the St. Cloud Public Service Company to determine, among other things, the original cost of the Gas Plant of said Company and the earnings and operating expenses of said plant.

That pursuant to instructions from said City of St. Cloud 136 deponent, as, a representative of said firm of accountants called at the office of the said Company in the City of St. Cloud on December 27th, 1920, and interviewed A. G. Whitney, President, C. A. Slaney, Secretary and Geo. W. Plank, General Manager of said Company, and requested permission from said officers to examine the books of said Company for the purposes aforesaid. That said officers of said Company refused to grant such permission, but did agree to prepare and furnish to said deponent a detailed statement of the capital investment account showing the principal items of expenditures from January 1916 to date, itemized in such a way as to show the character, location and extent of the improvements made during said period and the detailed cost thereof.

That on December 28th, in company with L. P. Wolff, Consulting Engineer for said City, deponent again called at the office of said Company and interviewed A. G. Whitney, Pres. and Geo. W. Plank, Gen. Mgr. in regard to an examination of the Company's books, and that permission to make such examination was again refused at that time and has not since been granted.

That on January 7th, 1921 deponent received from said Company a statement entitled "St. Cloud Public Service Company, Gas Department, Detailed Statements of Capital Investment Accounts showing Principal Items of Expenditures, for the Period from January 1916—October 31, 1920." That while said statement purports to show the expenditures of the Company during said period, the information contained therein is entirely inadequate to determine the location, character and extent of the improvements made, with a few minor exceptions, or the original cost thereof.

137 That said deponent was also furnished by said Company certain statements purporting to show the earnings and operating expenses of said Gas Department of said Company for the year ending October 31st, 1920, but that deponent has not been permitted by said Company to examine the books of said Company for the purpose of verifying said statements or for the purpose of determining the true and correct earnings and operating expenses of said Gas Department for that or any other period.

SYLVESTER J. HUNT.

Subscribed and sworn to before me this 12th day of January, 1921.

[SEAL.]

MAY PETTIGREW,  
*Notary Public, Ramsey County, Minnesota.*

My commission expires Sept. 14, 1921.

Filed in U. S. District Court January 21, 1921.

138 United States District Court, District of Minnesota, Sixth Division.

ST. CLOUD PUBLIC SERVICE COMPANY, Complainant,  
vs.

CITY OF ST. CLOUD, Defendant.

*Affidavit of Louis P. Wolff.*

STATE OF MINNESOTA,  
*County of Ramsey, ss:*

Louis P. Wolff, being first duly sworn, deposes and says that he is fifty-three years of age and resides in the City of St. Paul, Minnesota. That he studied civil engineering at the University of Minnesota and has been engaged in the practice of that profession for the past thirty-three years and that for more than thirty years he has specialized in municipal engineering. That he was City Engineer of the City of Red Wing, Minnesota, for about ten years previous to March 1899, and for two years from March 1899 to March 1901 was City Engineer of the City of Eau Claire, Wisconsin, and since March 1901 he has been continuously engaged in private practice as a Consulting Engineer, with offices in the City of St. Paul, Minnesota.

That since March 1901 deponent has been constantly engaged in designing and supervising the construction of municipal improvements, particularly water works, sewers and bridges; that his practice and experience has extended throughout the States of Minnesota, North and South Dakota, Montana, Iowa, Illinois and Wisconsin, and in addition thereto deponent has acted in a consulting capacity in the States of Oregon and Michigan.

That deponent's practice since March 1901 has required the making of a considerable number of valuations of public utility properties, the supervising of the laying of many miles of cast iron pipe and the valuation thereof and the construction and valuation of brick and frame buildings and the installation and valuation of electric, power, pumping and other equipment; that among other valuations made by the deponent are the following; water works systems, at Eau Claire, Rice Lake and Baraboo, Wisconsin, Rochester, Little Falls and Fergus Falls, Minnesota, Rock Rapids, Iowa, and Bismarck, N. D.; electric light and power plants at Red Wing and Little Falls, Minnesota, Milbank, S. D. and Portland, Oregon; electric railway at Portland, Oregon; gas plants at Winona and Red Wing, Minnesota; water power plants at St. Croix Falls, Wisconsin, Little Falls and International Falls, Minnesota, Portland, Oregon and many others.

That during said period of time deponent has made a study of and has become familiar with the principles governing the valuation of public utility properties of the character above described and has also been familiar with the cost of construction of such properties

and the unit prices for labor and materials entering into such construction.

140 That deponent has made a careful examination of the gas plant of the complainant devoted to the manufacture and distribution of gas in the City of St. Cloud, Minnesota, for the purpose of determining the condition and present value thereof.

That deponent has read and examined the Amended Bill in Equity and the Affidavits of A. G. Whitney, A. J. Luick and Geo. J. Grote in the above entitled action, the "Financial Statement and Statistics" referred to in the affidavit of the said A. G. Whitney and the "Inventory of the Gas Plant" and the "Valuation Report as of October 1st, 1920," both prepared by said A. J. Luick and referred to in his affidavit.

That the said "Valuation Report," so called, prepared by A. J. Luick, does not purport to show, except as the title may indicate, the true and fair value of the said property on the first day of October, 1920, nor at any other time, but is merely an estimate of the cost of reproducing the said property as it existed on said date on the basis of prices for labor, materials and construction prevailing at that time, and that the affidavit of the said A. J. Luick does not contain any definite statement as to the true and fair value of the said property on the first day of October, 1920, or at any other time, and that neither said "Valuation Report" nor any of the affidavits hereinbefore mentioned contain sufficient information to determine such value.

Deponent further states that beginning about the year 1915 prices of material and labor and all construction costs, which had been reasonably constant during the period from 1900 to 1915, began

to rise rapidly and reached an abnormal level in 1917, and  
141 that since 1917 such prices constantly fluctuated and re-  
mained far above the normal pre-war level until the year  
1920, and that during the latter part of 1920 such prices rapidly  
declined and are still declining at the present time.

For instance, the price of Western fir lumber has been reduced one-half at the mills; a reduction of \$20.00 per ton on cast iron pipe and \$30.00 per ton on east iron specials was announced by the United States Cast Iron Pipe and Foundry Company on December 20, 1920, and still lower prices have been quoted by other companies, and in the opinion of deponent a further reduction will be made in the near future following a reduction in cost of fuel and labor since that time; the price of pig lead, which had risen to about 11¢ per pound during the war and was 9¢ in the early part of 1920, is now quoted at 4.6¢ per pound in New York, which is substantially the normal pre-war price; extensive reductions in wages in various industries throughout the country have been announced in the public press from time to time and announcements of further reductions are of almost daily occurrence. It is also a matter of common knowledge that extensive reductions have recently been made in the prices of food and clothing, and in the opinion of deponent these reductions will result in further reductions in

the near future in prices of labor and of many of the materials entering into the construction and operation of gas plants.

That the unit prices used by A. J. Luick in making his estimate of the cost of reproduction as of October 1, 1920, represent substantially the maximum prices that have prevailed at any time during or since the war and cannot be considered normal or 142 fair or as reflecting the true and fair value of the said property.

That by reason of said conditions it will be necessary, in order to arrive at the fair present value of said property, to ascertain approximately the original cost and the cost of reproduction upon the basis of normal pre-war prices, which information the complainant has not furnished.

That the figures contained in paragraph 8, page 7 of the Amended Bill in Equity, purporting to show the original cost of complainant's gas property, do not correctly show said cost for the reason that they include about Twenty-nine Thousand Dollars (\$29,000.00) for property which has been abandoned.

That for the purpose of determining said original cost deponent asked permission of said Company to examine its books and records relating to said gas property, but that deponent was refused permission to make such examination, and that the only information which deponent has secured from complainant in regard thereto has been the information contained in the Amended Bill in Equity and other documents hereinbefore mentioned, which were all prepared by or on behalf of the complainant, and a statement entitled "St. Cloud Public Service Company, Gas Department, Detailed Statements of Capital Investment Accountants Showing Principal Items of Expenditures, for the Period from January 1916–October 31, 1920," which was prepared by said Company and furnished to Bishop, Brissman & Co., certified public accountants, of St. Paul, Minnesota, on January 7, 1921, and handed by them to deponent.

That said last named statement purports to show the original 143 cost of construction from January 1916 to October 31, 1920, but that many of the items contained therein should have been charged to maintenance instead of construction, and most of the items contained in the statement cannot be identified in the plant, making it impossible to determine whether such items have been properly charged.

It further appears that some of the charges contained in said statement are excessive as is shown by the fact that the cost of house services put in during that period, aggregating, according to information obtained elsewhere, approximately 400 in number, was \$13,408.21, while Mr. Luick's estimate of the cost of reproduction of all house services, numbering 1,247, on the basis of the high prices prevailing during 1920 was only \$14,009.00.

That deponent has checked the visible items of property contained in said inventory and has made minor corrections therein and that for the purpose of this affidavit deponent has accepted the said inventory so corrected. That using said corrected inventory as a basis, deponent estimates that the normal pre-war cost of repro-

duction new of the physical property of said gas plant, not including overheads and land, would not have exceeded the sum of One Hundred Twenty-five Thousand, Four Hundred and One Dollars (\$125,401.00), and that the proper allowance for overheads, estimated by Mr. Luick at twenty per cent (20%) of the reproduction cost new of the physical property including land, would not have exceeded fifteen per cent (15%) of the reproduction cost new of the physical property exclusive of land, or the sum of Eighteen Thousand, Eight Hundred and Ten Dollars (\$18,810.00), making

the total normal pre-war reproduction cost new of the entire  
144 physical property included in the inventory of October 1,

1920, except land, not to exceed the sum of One Hundred Forty-Four Thousand, Two Hundred and Eleven Dollars (\$144,-  
211.00).

That the amount allowed by the said A. J. Luick in his "Valuation Report" for depreciation in said gas plant is wholly inadequate, taking into consideration the age and use of said plant. For instance, the 300 H. P. Sterling boiler, which would have a useful life in ordinary service of not to exceed 25 years and which was originally installed as a part of the Street Railway Power Plant and has a capacity of at least double that required for the operation of the gas plant alone, has been in constant service for at least nineteen years, and from such an examination as deponent was able to make with the boiler in service, appears to be in poor condition, the cast iron front being cracked and the brick setting being cracked and bulged in places. The condition per cent of 85% assigned to this boiler by Mr. Luick is in the opinion of deponent clearly excessive and such condition per cent should not exceed 24%. Also the condition per cent of the benches, which were constructed fifteen years ago and which have not been in service for the past one and one-half years and are in poor condition, should not exceed 40% instead of 80% as given by Mr. Luick.

That from his examination and knowledge of the age and condition of said property, said deponent estimates that the so-called "condition per cent" of the physical property as a whole, exclusive of land, will not exceed seventy-seven per cent (77%), giving a

so-called normal pre-war value, including over-heads, but  
145 exclusive of land, not to exceed One Hundred Ten Thousand,

Six Hundred and Ninety Dollars (\$110,690.00), and if to said sum the sum of Ten Thousand Dollars (\$10,000.00) be added for the value of the land, the resulting figure, namely, One Hundred Twenty Thousand, Six Hundred and Ninety Dollars (\$120,-690.00), will represent the maximum normal pre-war value of all of the physical property contained in said inventory.

That from a comparison of the unit prices prevailing at the time said plant was actually constructed with the normal pre-war prices, deponent is of the opinion that the original cost of the physical property of said plant was less than the normal pre-war reproduction cost, including overheads, and did not exceed the sum of One Hundred Fifty Thousand Dollars (\$150,000.00) including land.

That in view of the abnormal conditions and the constant and

rapid fluctuations in prices which have prevailed since January 1, 1915, said deponent is of the opinion that the present fair value of said property cannot be determined on the basis of current prices prevailing at any one time, nor upon average prices prevailing during any period, and that the determination of said value must necessarily be a matter of judgment, taking into consideration the original cost, the normal pre-war reproduction cost, the prices which have prevailed since the pre-war period and the rapid fluctuations therein, the present and prospective decline in prices and the condition of the property, and that taking all of said things into consideration, said

deponent's best judgment is that the present fair value of  
146 the physical property of said plant should be arrived at by  
adding to the so-called normal pre-war value twenty-five per  
cent (25%) of said value, exclusive of land, amounting to Twenty-  
seven Thousand, Six Hundred Seventy-three Dollars (\$27,673.00)  
and the excess cost of construction during and since the war, over  
and above the normal pre-war cost plus twenty-five per cent (25%),  
estimated by deponent at Six Thousand and Five Dollars (\$6,-  
005.00), giving a maximum of One Hundred Fifty-four Thousand,  
Three Hundred Sixty-eight Dollars (\$154,368.00) for the present  
so-called physical value, including land.

That the proper amount to be allowed for working capital should  
be determined from an examination of the Company's books to as-  
certain the amount of working capital actually and necessarily em-  
ployed in the conduct of its business, which deponent has not been  
permitted to do, but that in the judgment of deponent such allow-  
ance so ascertained would not exceed the sum of Ten Thousand Dol-  
lars (\$10,000.00).

That the amount claimed for "Going Value" has sometimes been  
based upon the losses sustained by the Company during the early  
period of its operation, and in other cases upon the estimated cost of  
reproducing the business of the Company at the present time and  
under present conditions, but in either case the amount to be so al-  
lowed would not in the judgment of deponent exceed the sum of Ten  
Thousand Dollars (\$10,000.00). Deponent further states that he  
has not been permitted by the Company to examine its books for the

purpose of determining the amount expended in developing  
147 the business, but that in case an examination of the books  
should show that the cost of developing the business has been  
paid from earnings no allowance should be made for "going value"  
on account of such development cost, as it would be manifestly un-  
fair to permit the Company to collect such cost from the consumer  
in the first instance and than add it to its capital and require the con-  
sumer to pay a return thereon indefinitely.

It is sometimes claimed that "going value" includes something  
more than development cost, such increase resulting from excep-  
tional skill employed in the design of the plant, but such an element  
of value does not exist in this plant. The St. Cloud plant was con-  
structed piecemeal and any plant so constructed would necessarily be  
inferior in design to one designed and constructed as a whole at the  
present time.

That in the judgment of deponent, the amounts hereinbefore set forth for working capital and "going value" are the maximum amounts which should be allowed for these items, and that the *faire* value at the present time of the entire property and plant of the complainant, located in the City of St. Cloud, devoted to the manufacture and distribution of gas, considered as a going concern does not exceed the sum of One Hundred Seventy-four Thousand, Three Hundred Sixty-eight Dollars (\$174,368.00).

The manner in which the foregoing figures were arrived at by deponent is shown in detail in the accompanying statement, entitled "Valuation of Gas Plant at St. Cloud, Minnesota" and dated January 1921.

148 The unit prices used in making the estimates of normal pre-war construction cost were an average of the prices prevailing from Jan. 1, 1900 to Jan. 1, 1915, for those items on which the price had been reasonably constant during that period, being higher on some items like cast iron pipe, lead and labor than the prices prevailing on Jan. 1, 1915, and for some time prior thereto, while on other items like lumber on which there had been an upward trend during said period, the unit prices used corresponded to the current prices on Jan. 1, 1915. In determining the "condition per cent," deponent took into consideration the age and use of each item, the probable useful life and the physical condition so far as the same could be determined by an inspection of the visible property while in operation, but did not make any deduction in the value assigned to any item on account of excess capacity or lack of capacity, inadequate trackage and storage facilities, lack of space for expansion due to growth, nor the possibility of having to abandon or reconstruct any portion of the plant before the expiration of its probable useful life in order to provide for future growth, all of which could and should be properly considered in determining the true value of said property.

That said deponent has no information in regard to the earnings and operating expenses of said gas department except that contained in the Amended Bill and other documents filed by complainant. That said deponent has several times asked permission of said Company to examine its books and records for the purpose of checking such documents and of determining for himself the true and correct

149 earnings and operating expenses of said gas department, and that permission to make such examination has been refused, but that such examination will be necessary in order to enable deponent to arrive at a definite conclusion as to such earnings and operating expenses.

That deponent finds that the statements of earnings and expenses contained in the "Financial Statements and Statistics" contain many items for depreciation reserve, which are clearly excessive, and that by reason thereof the net earnings contained in said statements and in the Amended Bill in Equity are erroneous and misleading, such charges for depreciation amounting in some cases to about 8% of the "book value" of the property, which in itself includes a considerable amount for property which has been abandoned, whereas the proper

amount to be charged for such depreciation would be approximately 2½ % of the original cost of the property still in use.

That deponent is of the opinion that the estimate of operating expenses for the year ending August 1921, contained in the "Financial Statement and Statistics" prepared by the Company, is clearly excessive, and that the prices for coke, coal and gas oil contained therein, upon which said estimate is based, are much higher than the Company will be required to pay, and that the amount of gas sold will be greater and the amount of materials required per one thousand cubic feet of gas during said period will be materially less than indicated in said statement, and that said statement either in whole or in part cannot properly be used as a basis for determining either a temporary or a permanent rate for *for* said period or for any other period.

For instance the price of steam coal contained in said estimate is \$16.45 per ton, whereas deponent is reliably informed that a good quality of screened steam coal is now being purchased in the Twin Cities at \$6.00 per ton and could be delivered at St. Cloud for about \$8.00 per ton, and also that the prices for coke and gas oil are now materially below the prices used in said estimate.

LOUIS P. WOLFF.

Subscribed and sworn to before me this 21st day of January, 1921.

[Notarial Seal.] M. G. LEIGHTSCHERD,  
*Notary Public, Ramsey County, Minnesota.*

My commission expires December 16, 1925.

Filed in U. S. District Court January 22, 1921.

151 United States District Court, District of Minnesota, Sixth  
Division.

ST. CLOUD PUBLIC SERVICE COMPANY, Complainant,  
vs.

CITY OF ST. CLOUD, Defendant.

*Affidavit of Louis P. Wolff.*

STATE OF MINNESOTA,  
*County of Ramsey, ss:*

Louis P. Wolff, being first duly sworn, deposes and says that he resides in the City of St. Paul, Minnesota, and that he has been engaged in private practice as a Consulting Engineer for the past twenty years with offices in said City.

That on Dec. 14, 1920, deponent was employed by the City of St. Cloud, Minnesota, to make a valuation of all the property of the St. Cloud Public Service Company within the city limits of said City, including the Gas Department of said Company and to make

152 a complete examination and investigation of the business, property and affairs of said Company. That immediately after his appointment in the afternoon of said day deponent in company with the City Clerk of said City called at the officers of said Company in said City, and that at that time the said City Clerk delivered to C. A. Slaney, Secretary of said Company, in the presence of the deponent, a certified copy of a resolution which had been passed and adopted by the City Commission of said City on said day, and which, among other things, set forth that the said deponent had been employed by said City "to make a complete examination and investigation of the business, property and affairs of said Company and which requested the officers and agents of the said Company to furnish and submit to the City Commission and to deponent and his necessary assistants and to auditors representing the said City of St. Cloud, any and all inventories of the Company's property employed or involved in service rendered to the City of St. Cloud or its inhabitants, its corporate records, minutes, books of account, audits, leases, deeds of conveyance, statements, vouchers, and any and all other detailed information possessed by it necessary to be considered in connection with the execution of said work."

That following the delivery of the certified copy of the said resolution to said Slaney, deponent, requested said Slaney to furnish him with copies of the "Inventory" and "Valuation Report" on the gas plant of said Company prepared by A. J. Luick, Consulting Engineer of Chicago, Illinois, and also copies of the affidavits of

153 A. G. Whitney, A. J. Luick and Geo. F. Grote, which have been filed in this action, and of the Financial Statement and

Statistics mentioned in said affidavits. Deponent further asked said Slaney for permission to examine the books and records of said Company for the purpose of securing information in regard to the original cost of the said gas plant and the earnings and operating expenses thereof. That the said Slaney, after consulting Geo. W. Plank, Gen. Mgr. of said Company, and J. D. Sullivan, the Attorney for the said Company, notified said deponent that copies of the documents above referred to would not be furnished and that permission to examine the books for the purposes above stated would not be granted to deponent.

That thereafter on December 16, 1920, deponent was informed by the City Attorney of said City that the said Company, upon the advice of its Attorneys, had agreed to grant permission to the said City and its agents to examine the books of said Company and to inspect its gas property, and had furnished him with a copy of the inventory and valuation report prepared by A. J. Luick and a copy of the Financial Statement and Statistics.

That immediately following the receipt of said information, deponent commenced the work of checking the visible property of the gas plant of said Company with said inventory and directed his Associate, Mr. Geo. M. Shepard, to examine the Company's books for the purpose of determining the original cost of said gas plant. That pursuant to such instructions the said Shepard visited the office

of said Company and in the presence of employees of the Company obtained certain fragmentary items of information from the 154 Company's books regarding said gas plant, but that the information so obtained was wholly insufficient to determine such original cost.

That deponent again interviewed said Slaney on December 21 and 22, 1920, in regard to an examination of the Company's books and deponent notified said Slaney that the information furnished by said Company up to that time was unsatisfactory and insufficient and was informed by said Slaney that further information would be given, subject to approval of A. G. Whitney, Pres.

That thereafter deponent requested Mr. Sylvester J. Hunt, an expert accountant employed by the firm of Bishop, Brissman & Company, certified public accountants, of St. Paul, Minnesota, to go to St. Cloud on behalf of said City on December 27, 1920, and examine the books of said Company for the purpose of determining, among other things, the original cost of the gas plant of said Company and the earnings and operating expenses thereof. That said Hunt spent Dec. 27 and 28, 1920, in said City in an effort to secure free access to said books without success. That on December 28, 1920, deponent in company with the said Hunt interviewed A. G. Whitney, Pres., and Geo. W. Plank, Gen. Mgr., in regard to an examination of the Company's books, and was informed by said officers that neither deponent nor the agents of said City would be permitted to examine the Company's books, but that the Company would furnish a statement showing such information as deponent might desire, and that

the Company was then preparing a detailed statement showing the original cost of those portions of the Company's gas plant constructed after January 1916.

That thereafter about January 8, 1921, deponent received from the said Hunt a statement furnished him by the said Company, entitled "St. Cloud Public Service Company, Gas Department, Detailed Statements of Capital Investment Accounts showing Principal Items of Expenditures, for the Period from January 1916-October 31, 1920". That deponent has examined said statement and that while the statement purports to show the expenditures of the Company during said period for new construction, the information contained therein is entirely inadequate to determine the location, character and extent of the improvements made, with a few minor exceptions, or the original cost thereof and it is apparent that many of the items should have been charged to maintenance instead of to new construction.

It further appears that some of the charges contained in said statement are excessive as is shown by the fact that the cost of house services put in during that period, aggregating, according to information obtained elsewhere, approximately 400 in number, was \$13,408.21, while Mr. Luick's estimate of the cost of reproduction of all house services, numbering 1,247, on the basis of the high prices prevailing during 1920 was only \$14,009.00.

Deponent further states that the statements of earnings and expenses contained in the "Financial Statements and Statistics" con-

tain many items for depreciation reserve, which are clearly excessive, and that by reason thereof the net earnings contained 156 in said statements and in the Amended Bill in Equity are erroneous and misleading, such charges for depreciation amounting in some cases to about 8% of the "book value" of the property, which in itself includes a considerable amount for property which has been abandoned, whereas the proper amount to be charged for such depreciation would be approximately 2 $\frac{1}{4}$ % of the original cost of the property still in use.

Deponent further states that a full and independent examination of the Company's books and records by the agents of said City will be necessary for the following purposes:

1st. To determine the original cost of the property embraced in the gas plant of said Company as it now exists, such original cost being desirable in order to determine the proper amount to be allowed for depreciation reserve and as an important item of information in determining the present value of the property.

2nd. To determine the true and correct earnings and operating expenses of said gas property.

3rd. To determine the amount of each class of material necessarily used in the manufacture of gas and the amount of gas made and gas sold or unaccounted for.

4th. To determine the amount, if any, expended by the said Company in developing the business of said gas property.

5th. To determine the age of each item of said property.

6th. To determine what portion of the overhead and general expenses of said Company may properly be apportioned to 157 said gas property.

Without the information above enumerated deponent will be unable to make a definite and accurate determination of the original cost of said gas plant and its age or of the earnings and necessary operating expenses thereof.

LOUIS P. WOLFF.

Subscribed and sworn to before me this 21st day of January, 1921.

[Notarial Seal.] M. G. LICHTSCHEID,  
*Notary Public, Ramsey County, Minnesota.*

My commission expires December 16, 1925.

Filed in U. S. District Court January 22, 1921.

158 Filed Jan. 22, 1921. Charles L. Spencer, Clerk, by L. A. Levorsen.

## EXHIBIT —.

#117. Eq.

*Valuation of Gas Plant at St. Cloud, Minn.*

L. P. Wolff, Consulting Engr.

Geo. M. Shepard, Associate.

St. Paul Minn.

Jan., 1921.

## 159 VALUATION OF GAS PLANT AT ST. CLOUD, MINNESOTA.

L. P. Wolff, Consulting Engineer.

Geo. M. Shepard, Associate.

St. Paul, Minnesota.

January, 1921.

160 *General Summary of Normal Pre-war Construction Cost and Depreciation and Pre-war and Present Values of the St. Cloud, Minn., Gas Plant.*

Based on Inventory of Oct. 1, 1920.

Classification.	Normal pre-war construction cost.	Cond. %.	Normal pre-war value.
Transmission and Distribution....	\$69,272	85	\$58,777
Buildings and Miscellaneous Structures .....	8,763	72	6,262
Plant Equipment .....	44,162	65	28,698
General Equipment .....	3,204	79	2,515
	—	—	—
Total Physical Property, except Land, in inventory of Oct. 1, 1920, without overheads.....	125,401	77	96,252
Overhead charges, 15% .....	18,810	77	14,438
	—	—	—
Total Physical Property, except Land, in inventory of Oct. 1, 1920, including overheads.....	144,211	77	110,690
Add for Land (present value) .....			10,000

Maximum Normal Pre-War Value of Physical Property  
in inventory of Oct. 1, 1920, including land and over-  
heads ..... 120,690

To get Present Value, add

1st—25% of Pre-War Value, except land, amounting to .....	27,673
2nd—Excess War Cost, being the difference in actual cost (estimated) of items constructed during and since the war and the construction cost of such items on the basis of normal pre-war prices plus 25% .....	6,005

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Total Present Value of Physical Property in inventory of Oct. 1, 1920 .....	154,368
Fair allowance for Working Capital .....	10,000
Fair allowance for Going Value .....	10,000

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Grand Total .....	174,368
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*161 Detailed Summary of Normal Pre-war Construction Cost and Depreciation and Pre-war and Present Values of the St. Cloud, Minn., Gas Plant.*

Based on Inventory of Oct. 1, 1920.

A. Land. A-1. Gas Works Land.

Classification.	Reproduction cost.	Condition, per cent.	Pre-war and present value.
Works Land, Gas Department Proportion .....	\$10,000.	100	\$10,000.

Normal pre-war construction cost.	Unit price.	Age.	Life.	Cond., %.	Normal pre-war value.
<b>B. Transmission and Distribution:</b>					
<b>B-1. Mains:</b>					
1,135' of 4" Cast Iron Cement Joints.....	.55	624	10	90	562
6,386' " 3" " Lead.....	.47½	3,033	10	90	2,730
51,943' " 4" " ".....	.56	29,088	10	90	26,179
5,029' " 6" " ".....	.73	3,671	13	75	3,304
3,748' " 8" " ".....	.95½	3,579	14	100	3,221
811' " 10" " ".....	1.20	973	14	100	876
<b>69,052' Total Cast Iron Mains.....</b>		<b>40,968</b>	<b>11</b>	<b>66</b>	<b>90</b>
1,895' of 1" Steel.....	.19	360	..	25	..
310' " 1½" Steel.....	.20	62	..	25	..
1,490' " 1½" ".....	.21	313	..	25	..
34,945' " 2" ".....	.24	8,387	..	30	..
<b>38,640' Total Steel Mains.....</b>		<b>9,122</b>	<b>5</b>	<b>30</b>	<b>83</b>
<b>Total Mains.....</b>		<b>50,090</b>	<b>..</b>	<b>..</b>	<b>89</b>
<b>B-2. Services:</b>					
<b>House Services:</b>					
722-1" Services.....	5.75	4,152	10	25	63
310-1½" Services.....	6.35	2,216	3	25	91
<b>2,616</b>					
<b>2,017</b>					

<u>65—1½"</u>	<u>"</u>	<u>6</u>	<u>.....</u>	<u>7.00</u>	<u>455</u>	<u>5</u>	<u>25</u>	<u>82</u>	<u>373</u>
<u>111—2"</u>	<u>"</u>	<u>6</u>	<u>.....</u>	<u>8.30</u>	<u>921</u>	<u>5</u>	<u>30</u>	<u>85</u>	<u>783</u>
<u>1,247</u>	<u>Total House Services</u>	<u>.....</u>	<u>.....</u>	<u>.....</u>	<u>7,744</u>	<u>7</u>	<u>26</u>	<u>75</u>	<u>5,789</u>
<u>163</u>									

## B-2. Services (Cont.):

## Curb Services:

<u>4—1"</u> Services	<u>.....</u>	<u>4.50</u>	<u>18</u>	<u>:</u>	<u>25</u>	<u>:</u>	<u>25</u>	<u>:</u>	<u>25</u>
<u>23—1¼"</u> Services	<u>.....</u>	<u>5.00</u>	<u>115</u>	<u>:</u>	<u>25</u>	<u>:</u>	<u>25</u>	<u>:</u>	<u>25</u>
<u>26—1½"</u>	<u>"</u>	<u>5.50</u>	<u>143</u>	<u>:</u>	<u>25</u>	<u>:</u>	<u>25</u>	<u>:</u>	<u>25</u>
<u>14—2"</u>	<u>"</u>	<u>6.00</u>	<u>84</u>	<u>:</u>	<u>30</u>	<u>:</u>	<u>30</u>	<u>:</u>	<u>30</u>
<u>67</u>	<u>Total Curb Services</u>	<u>.....</u>	<u>362</u>	<u>3.0</u>	<u>26</u>	<u>89</u>	<u>322</u>		
<u>163</u>	<u>Total Services</u>	<u>.....</u>	<u>8,106</u>	<u>..</u>	<u>..</u>	<u>75</u>	<u>6,111</u>		

Classification.	Unit price.	Normal pre-war construction cost.	Age.	Life.	Cond., %.	Normal pre-war value.
<b>B-3. Meters:</b>						
Regular Meters in Service:						
97—5A Maryland .....	7.60	737	..	..	..	....
4—20A .....	18.25	73	..	..	..	....
1—30A .....	26.50	27	..	..	..	....
679—5B .....	7.60	5,160	..	..	..	....
4—10B .....	10.50	42	..	..	..	....
19—30B .....	26.50	504	..	..	..	....
1—5 lt. .....	8.00	8	..	..	..	....
229—5 lt. Cleveland .....	7.60	1,740	..	..	..	....
2—10 lt. .....	10.00	20	..	..	..	....
8—30 lt. .....	26.50	212	..	..	..	....
168—#1A Sprague .....	8.80	1,478	..	..	..	....
1—#5 .....	49.00	49	..	..	..	....
27—#3 .....	16.50	446	..	..	..	....
5—3 lt. American .....	8.30	42	..	..	..	....
			—	—	—	—
		10,538	7.4	25	74	7,798
<b>1,245 Total Regular Meters in Service.....</b>						
Prepay Meters in Service:						
11—5 P P Cleveland .....	10.00	10	2.5	25	90	9

### B-3. Meters (Cont.):

### Regular Meters in Stock:

Classification.	Normal pre-war construction cost. Unit price.	Age.	Life.	Cond., %.	Normal pre-war value.
<b>Steam Railroad Crossings:</b>					
Single Track:					
1—Over 2" Steel Main.....	4.00	4	..	..	3
Double Track:					
1—Over 10" Cast Iron Main.....	7.00	7	..	..	6
Distribution Tools .....	....	78 283	.. ..	.. ..	66 226
Total Transmission and Distribution .....	....	69,272	..	..	58,777
<b>165</b>					
<b>C. Buildings and Miscellaneous Structures:</b>					
<b>C-1. Gas Manufacturing Plant Buildings:</b>					
Retort House .....	....	2,409 1,763	18 21	50	67
Boiler House .....	....	174	4	50	67
Water Gas Exhauster House .....	....	2,605	18	50	85
Condenser, Purifier and Meter House .....	....	1,655	14	50	75
Coal Storage Shed .....	....	89	1	20	90
Pipe Shed .....	....				80
Total Gas Manufacturing Plant Buildings..	....				72
					6,218
					18

C-2. Miscellaneous:  
Cement Sidewalk . . . . .

Total Buildings and Miscellaneous Structures.

166

D. Plant Equipment:

D-1. Coal Gas Equipment:

2—Half depth Benches of Sixes	2,500	5,000	11	17	40	2,000
1—#3 Roots' Exhauster and 3 1/4" x 5" Kerr Murray	....	600	14	25	44	264
Co. Steam Engine . . . . .	....	500	8	25	68	340
1—#1 Roots' Exhauster and 4 1/2" x 5" Slide Valve	....	250	14	30	60	150
Steam Engine . . . . .	....	75	14	30	60	45
1—8" P. & A. Tar Extractor . . . . .	....	1,000	1 1/2	20	98	980
1—4' 0" x 2' 6" Steel Wash Box . . . . .	....	75	14	25	50	38
2—St. Paul Machinery Co. Electric Driven Portable	....	6	4	20	80	5
Coal Conveyor . . . . .	....	—	—	—	—	—
1—#5 N. Fairbanks' Platform Scale . . . . .	....	7,506	..	..	51	3,822
1—1' 5" Diam. x 2' 6" Enricher Tank. . . . .	....	—	—	—	—	—
Total Coal Gas Equipment. . . . .	....	—	—	—	—	—

Classification.	Unit price.	Normal pre-war construction cost.	Age.	Life.	Cond., %.	Normal pre-war value.
<b>D-2. Water Gas Equipment:</b>						
1—5' 0" Gas Machinery Co. Water Gas Set.....	3,000		4	20	90	2,700
1—#4 Sturtevant Turbo Blower Set.....	800		4	20	80	640
1—#5 " " "	950	New	20	100	950	950
1—#4 Roots' Exhauster and 4½" x 6" N. Y. S. S. P. Co. Steam Engine.....	600	4	25	80	480	480
1—2½" x 3" x 4" M. T. Davidson Simplex Steam Oil Pump.....	60	4	20	80	48	48
1—4" x 2½" x 5" Deane Bros. Duplex Steam Oil Pump .....	80	4	20	80	64	64
	<hr/> 5,490	<hr/>	<hr/> ..	<hr/> ..	<hr/> 89	<hr/> 4,882
167						
<b>D-2. Water Gas Equipment (Cont.):</b>						
1—Steam Coke Hoist.....	150		.7	20	95	143
1—7' 0" Diam. x 29' 0" Steel Oil Tank.....	525		14	30	50	263
1—8' 0" Diam. x 26' 6" " " ".....	700		1.2	25	95	665
1—3' 6" Diam. x 16' 0" " " ".....	225		4	25	50	112
	<hr/> 7,090	<hr/>	<hr/> ..	<hr/> ..	<hr/> 86	<hr/> 6,065
Total Water Gas Equipment.....						
<b>D-3. General Coal and Water Gas Equipment:</b>						
1—3' 6" Diam. x 18' 6" Atmospheric Condenser.....	600		14	30	58	348
1—3' 6" Diam. x 15' 6" Multi-tubular Condenser.....	400		14	30	58	322

1—3' 6" Diam. x 18' 6" Tower Scrubber.....	300	14	30	58	174
2—8' 0" x 8' 0" x 10' 0" Cast Iron Purifiers.....	2,500	14	50	75	1,875
1—4' 6" x 4' 6" Station Meter.....	1,000	14	30	40	400
1—6" x 4" x 6" Fairbanks-Morse Duplex Steam Tar Pump .....	120	14	20	30	36
1—#3 Sturtevant Belt Driven Booster.....	90	2	20	90	81
1—3 H.P. Western Electric Induction Motor.....	100	2	20	90	90
1—12' 0" Diam. x 10' 0" Deep Cement Brick Tar Well .....	250	14	40	65	163
1—Side Track .....	300	21	50	60	180
		—	—	—	—
Total General Coal and Water Gas Equipment.....	5,660	..	..	63	3,579
Total Coal and Water Gas Equipment.....	20,256	..	..	66	13,466
168					
D-4. Boiler Plant Equipment:					
1—300 H. P. Sterling Boiler.....	4,800	19	25	24	1,152
1—60" x 17' 6" Fire Tubular Boiler.....	1,350	1	20	75	1,013
1—6" x 4" x 6" Fairbanks-Morse Duplex Boiler Feed Pump .....	120	14	20	30	36
		—	—	—	—
Total Boiler Plant Equipment.....	6,270	..	..	35	2,201
D-5. Holders and Accessories:					
1—50,000 Cu. ft. Single Lift Steel Tank Gas Holder.....	9,000	14	40	70	6,300
1—10,000 Cu. ft. Single Lift Steel Tank Relief Holder.....	3,000	4	40	92	2,760
		—	—	—	—
Total Holders and Accessories.....	12,000	..	..	75	9,000

Classification.	Unit price.	Age.	Life.	Cond., %.	Normal pre-war construction cost.	Normal pre-war value.
<b>D-6. Piping and Wiring:</b>						
Gas Lines.....	2,591	11	11	70	1,814	1,814
Steam Lines.....	820	10	25	65	533	533
Exhaust Lines.....	79	10	25	65	51	51
Water Lines.....	160	10	25	65	104	104
Blast Lines.....	37	2	25	80	30	30
Gas Lighting Lines.....	32	14	25	65	21	21
Oil Lines.....	125	4	25	80	100	100
Tar Lines.....	244	14	25	65	159	159
Gauge Lines.....	47	4	25	80	38	38
Drain Lines.....	13	10	25	65	8	8
Plumbing and Sewerage.....	1,203	14	50	75	902	902
Lighting Circuits.....	235	1	20	95	223	223
Power Circuits.....	50	1	20	95	48	48
		—	—	—	—	—
Total Piping and Wiring.....	5,636	..	..	..	72	4,031
Total Plant Equipment.....	44,162	..	..	..	65	28,698
169 & 170						

**E. General Equipment:****E-1. General Office Equipment:**

Main Office Furniture and Fixtures—

Proportion to Gas Department—

Store Room Furniture and Fixtures—	.....	.....	.....	.....	.....	.....
Proportion to Gas Department.....	.....	.....	.....	.....	.....	.....
Bank Building—Accounting Department Furniture and Fixtures—	.....	.....	.....	.....	.....	.....
Proportion to Gas Department.....	.....	.....	.....	.....	.....	.....
Main Office Piping and Sundries—	.....	.....	.....	.....	.....	.....
“ “ Wiring “ “	.....	.....	.....	.....	.....	.....
Proportion to Gas Department.....	.....	.....	.....	.....	.....	.....
Total General Office Equipment.....	1,746	..	80	..	1,397	
E-2. Shop Equipment:						
Meter Shop Furniture and Fixtures.....	.....	.....	.....	.....	.....	.....
“ “ Equipment.....	.....	.....	.....	.....	.....	.....
“ “ Tools.....	.....	.....	.....	.....	.....	.....
Total Shop Equipment.....	300	..	..	..	80	240
E-3. Miscellaneous Equipment:						
Works Furniture and Fixtures.....	.....	.....	.....	.....	.....	.....
Plant Tools.....	.....	.....	.....	.....	.....	.....
Laboratory Equipment.....	.....	.....	.....	.....	.....	.....
Total Miscellaneous Equipment.....	670	..	..	..	80	536
E-4. Utility Equipment:						
Ford Auto Truck.....	488	..	..	..	70	342
Total General Equipment.....	3,204	..	..	..	79	2,515

171 United States District Court, District of Minnesota, Sixth  
Division.ST. CLOUD PUBLIC SERVICE COMPANY, Complainant,  
vs.

CITY OF ST. CLOUD, Defendant.

*Motion to Dismiss.*

Now comes the defendant, pursuant to the agreement made in open Court before Hon. Wilbur F. Booth, Judge of said Court, and moves to dismiss the above entitled action upon each and all of the following grounds:

1. That it conclusively appears that the complainant is furnishing gas service to the defendant and its inhabitants in compliance with the terms of a contractual ordinance limiting the maximum cost of fuel gas to the sum of One and 35/100 Dollars (\$1.35) per thousand cubic feet of gas, and that complainant is bound by said contractual ordinance.
2. For want of equity in said action.
3. That no Federal question is involved in said action.
4. That the Court has no jurisdiction in said cause.

Said motion is based upon the pleadings in the above entitled cause, and upon all of the files and records in said action.

The defendant will bring said matter on for hearing before said Court at a time and place to be fixed by the order of said Court covering a hearing upon said motion for dismissal, upon the order to show cause of said Court to be entered herein.

Dated, St. Cloud, Minn., January 5th, 1921.

Yours respectfully,

R. B. BROWER,  
*Attorney for said Defendant.*

To Messrs. Cobb, Wheelwright & Benson, Minneapolis, Minn., and J. D. Sullivan, St. Cloud, Minnesota, Solicitors for Complainant.

Filed in U. S. District Court January 22, 1921.

- 173 United States District Court, District of Minnesota, Sixth Division.

ST. CLOUD PUBLIC SERVICE COMPANY, Complainant,

vs.

CITY OF ST. CLOUD, Defendant.

*Order to Show Cause.*

Upon reading the Bill of Complaint herein, as amended, and upon the affidavits of the Commissioners of the City of St. Cloud, defendant, and of R. B. Brower, Esq., attorney for said defendant, and on motion of R. B. Brower, Esq., and upon the annexed defendant's Motion to Dismiss, and upon the application of R. B. Brower, Esq., attorney for the defendant, for an order for hearing upon said Motion to Dismiss:

It is hereby ordered, that the above named complainant appear before the undersigned, one of the Judges of said Court, at Chambers, in the Federal Building, in the City of Minneapolis, County of Hennepin, and State of Minnesota, on the 22d day of January, 1921, at ten o'clock in the fore-noon of that day, or as soon thereafter as counsel can be heard, and show cause before said Court why the above entitled cause shall not be dismissed, and the defendant's motion in that behalf granted, and such other relief in that behalf shall not be granted as may be just, lawful and proper.

Let a copy of said Motion to Dismiss and of said affidavits be served upon the solicitors for the complainant, forthwith.

Dated at Minneapolis, Minnesota, this 22d day of January, A. D. 1921.

WILBUR F. BOOTH,

*Judge.*

Filed in U. S. District Court January 22, 1921.

- 175 United States District Court, District of Minnesota, Sixth Division.

ST. CLOUD PUBLIC SERVICE COMPANY, Complainant,

vs.

CITY OF ST. CLOUD, Defendant.

*Rebutting Affidavit of A. G. Whitney.*

STATE OF MINNESOTA,

County of Hennepin, ss:

A. G. Whitney being first duly sworn on his oath says that he is the A. G. Whitney who verified the original and amended bills herein

and who made the affidavit found on pages 32 to 35, both inclusive, of the printed record in this cause.

Deponent further says that he has read the following allegation in the answer herein found on page 120 of the printed record:

"that it (defendant) has applied to the complainant and its executive officers for the right and privilege to inspect the books, records and papers of the complainant pertaining to its gas service and the records covering the costs of its gas service and business, but that while certain information, incomplete and fragmentary, has been accorded, that vital records have been missing and have not been produced. That supporting vouchers called for by the valuation engineer and auditors of the defendant have not been furnished, but have been suppressed; that the minute books showing the transfer of the gas properties to the complainant have been withheld, and that opportunity upon the part of defendant and its representatives with respect to the gaining of information so as to more fully set forth the actual facts with respect to the actual cost of manufacture and sale of gas, has been obstructed and denied."

176 Deponent further says that said statement is not true. That on the 15th day of December, 1920, there was delivered to R. B. Brower, the City Attorney, the financial statement and statistics hereto attached and made a part of this affidavit. That said financial statement and statistics are the ones referred to in deponent's affidavit and in that of A. J. Luick on pages 39 and 40, both inclusive, of said printed record.

Deponent further says that on the 15th day of December, 1920, there was furnished to said Brower a copy of the inventory of the physical property of the gas department of complainant, being the inventory referred to in the affidavit of Grote herein and of Luick.

Deponent further says that on the 15th day of December, 1920, there was furnished to said Brower the valuation report of said Luick referred to in his said affidavit with the unit prices shown therein.

Deponent further says that on the 28th day of December, 1920, there was furnished to the defendant copies of excerpts from the minutes of the stockholders' meeting of the St. Cloud Public Service Company held August 17, 1915, consisting of one paragraph of typewritten matter and copy of excerpt from minutes of Board of Directors' meeting of said Company held August 17, 1915, and that the information so furnished is that referred to in the said allegation of said answer.

Deponent further says that complainant has at all times been willing to furnish defendant with all vouchers of its gas department covering costs and expenditures and offered so to do prior to the filing of the answer.

177 Deponent further says that on the 25th day of January, 1921 he wrote a letter to the attorney for the defendant in which deponent offered to permit the defendant's experts and the defendant's attorney to examine all the books and records of the complainant with respect to its gas department.

Deponent is informed and believes and states the fact to be that on the 6th day of January, 1921, there was furnished to the Auditors of the defendant at their request, an itemized statement showing all sums spent by the complainant in its gas department for betterments, additions and extensions for the period commencing January 1, 1916 and ending on October 31, 1920.

Deponent further says that he is informed and believes that said Auditors were advised at the time when said statement was furnished that each item appearing thereon could be verified by said Auditors by an examination of the complainant's books.

A. G. WHITNEY.

Subscribed and sworn to before me this 27th day of January, 1921.

SARA H. CLOUGH, [Notarial Seal.]  
*Notary Public, County of Hennepin, Minnesota.*

My commission expires Mar. 20, 1924.

## St. Cloud Public Service Company.

## Gas Department.

*Financial Statement & Statistics.*

St. Cloud, Minnesota, October 31st, 1920.

C. A. Slaney.

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Description.	Period.		Exhibit.	Sheet No.
	From—	To—		
Statement of Earnings & Expenses by years, also for the 9 months ended September 30th, 1920 .....	January 1, 1915	September 30, 1920.....	"A"	1
Statement of Earnings & Expenses by months Statement of Materials & Supplies on hand..	January 1, 1919	September 30, 1920.....	"B"	2-3 and 4
Statement of Coal, Oil, Coke on hand at the end of each month.....	September 30, 1918	September 30, 1920.....	"C"	5
Balance Sheet of the St. Cloud Public Service Company .....	September 30, 1918	August 31st, 1920.....	"D"	6
Balance Sheet showing Assets and Liabilities of the Gas Dept. separated from the Gen- eral Balance Sheet of the Company to the best of our knowledge .....	As at August 31st, 1920.....	"E"	7	
Original Cost of Property & Plant .....	As at August 31st, 1920.....	"F"	8	
	As at August 31st, 1920.....	"G"	9 and 10	

Operating results and Efficiencies by years, also  
for the 9 months ended September 30th,  
1920 . . . . .

Also for the 21 months ended 9/30/20 . . . . .

Average cost of gas coal, coke and Oil from . . . . .

Average Selling Price of Residuals by years . . . . .

Study of Labor Costs (by years) . . . . .

Gas Sales, Gas Made and Unaccounted for . . . . .

Number of Gas Meters in Service . . . . .

Population Statistics . . . . .

Method Used in Proportioning Expenses Be-  
tween Departments . . . . .

180 Actual purchase price of gas meters  
showing invoiced price, freight

charges and size of meters . . . . .

sundry purchases of cast iron and steel pipe . . . . .

Statement showing First Mortgage Bonds . . . . .

Statements showing the method of determin-  
ing the going value by the early loss  
method—Losses from beginning of plant  
to September 30th 1920 . . . . .

January 1, 1907, September 30, 1920 . . . . . "X"

111 January 1, 1915, September 30, 1920 . . . . . "H"

111 A September 30, 1918, August 31st, 1920 . . . . .

112 January 1st, 1914, September 30, 1920 . . . . . "J"

113 "K" January 1, 1915, October 31st, 1920 . . . . .

114 and 15 "L" January 1, 1915, August 31st, 1920 . . . . .

116 "M" September 30, 1910, September 30, 1920 . . . . .

117 "P" Year 1900, Year 1920 . . . . . "R"

118 "S" Year 1900, Year 1920 . . . . . "S"

119 January 1, 1917, September 30, 1920 . . . . . "T"

20 January 1, 1918, September 30, 1920 . . . . . "U"

21 August 1st, 1915, August 31st, 1920 . . . . . "V"

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## EXHIBIT "A."

## Sheet 1-A.

*Gas Operating Statement for the Year Ended December 31, 1909.*

Compiled by Marwick, Mitchell, Peat &amp; Co.

Book Value of Property &amp; Plant..... \$92,466.59

## Earnings:

Fuel .....	\$5,269.33
Illuminating .....	472.20
	<hr/>
	5,741.53

## Cost of Manufacturing:

Coal .....	\$5,178.24
Labor .....	981.46
Gas & Electric Light used.....	201.31
Repairs to Plant.....	183.41
Insurance .....	156.00
Nap-tha .....	36.46
Miscellaneous .....	79.74
	<hr/>
	6,816.62

## Less:

Coke .....	\$2,148.00
Tar .....	367.65
	<hr/>
	2,515.65

Net Manufacturing Cost..... 4,300.97

## General Expense:

Salaries .....	1,627.20
Stationery, Printing & Advertising	180.00
Rent .....	20.00
Miscellaneous .....	16.57
	<hr/>
	1,843.77

Total Cost ..... \$6,144.74

Net Loss ..... \$403.21

Above does not include discounts, interest, depreciation, office work, taxes, bad debts, etc.

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## EXHIBIT "A."

## Sheet 1-B.

*Gas Operating Statement for the Year Ended December 31st, 1908.*

Compiled by Marwick, Mitchell, Peat & Co.

Book Value of Property & Plant..... \$94,212.08

## Earnings:

Fuel Gas .....	\$9,777.19
Illuminating Gas .....	379.29
	————— \$10,156.48

## Cost of Manufacturing:

Coal .....	\$6,268.55
Labor .....	1,269.66
Gas & Electric Light used.....	232.86
Repairs .....	231.32
Taxes .....	600.00
Insurance .....	156.00
Water .....	120.00
Fuel .....	427.10
Depreciation .....	1,723.20
	—————
	\$11,028.69

## Less:

Coke Sales .....	\$3,368.08
Tar Sales .....	595.15
	—————
	3,963.23

Net Manufacturing cost..... \$7,065.46

## General Expense:

Salaries .....	\$1,640.00
Stationery, Printing & Advertising .....	150.54
Miscellaneous .....	60.33
	—————
	\$1,850.87

Total Cost .....

\$8,916.33

Net Earnings .....

\$1,240.15

Above does not include discounts, interests, office help, rent, and  
not a proper depreciation charge.

## 183 EXHIBIT "A."

## Sheet 1-C.

Gas Operating Statement for the Year Ended December 31, 1909.

Compiled by Marwick, Mitchell, Peat & Co.

## Net Earnings:

Fuel Gas .....	\$10,471.21
Illuminating Gas .....	417.82
	<hr/>
	\$10,889.03

## Total Operating Expense:

Less Residuals .....	\$12,117.90
Coke & Tar Sales.....	\$4,000.16
Adjustments .....	282.08
	<hr/>
	4,282.24
	<hr/>
	7,835.66

## Net Earnings .....

3,053.37

Does not include taxes, insurance, depreciation, interest, office rent, uncollectible bills, etc.

## 184

## EXHIBIT "A."

## Sheet 1-D.

Gas Operating Statement for the Year Ended December 31, 1910.

Compiled by Marwick, Mitchell, Peat & Co.

## Book value of Property &amp; Plant..... \$105,570.02

## Net Earnings:

Fuel .....	\$14,118.89
Illuminating Gas.....	528.26
	<hr/>

14,637.15

## Total Operating Expense..... \$14,801.73

## Less Residuals Coke &amp; Tar

Sales .....

\$4,423.72 4,423.72

---

10,378.01

## Adjustments .....

462.07

---

10,840.08

## Net Earnings.....

3,787.07

Above does not include, discounts, interest, depreciation, bad debts, taxes, insurance, office rent, etc.

185

## EXHIBIT "A."

## Sheet 1-E.

*Gas Operating Statement for the Year Ended December 31, 1911.*

Compiled by Marwick, Mitchell, Peat &amp; Co.

Book Value of Property and Plant..... \$108,462.37

## Earnings:

Fuel Gas.....	\$16,730.85
Illuminating Gas.....	576.44
<hr/>	

\$17,307.29

## Operating Expense:

Fuel—Boiler .....	1,502.21
Fuel Retort.....	1,426.50
Fuel Generator.....	6,756.41
Labor Plant.....	1,499.36
Labor Distribution.....	265.00
Water and Light.....	967.13
Repairs .....	576.30
Taxes .....	600.00
Insurance .....	349.55
Depreciation .....	3,600.00
<hr/>	
	17,541.46

## Less:

Coke Sales.....	4,378.10
Tar Sales.....	595.83
<hr/>	

Net Operating Expense..... 12,567.53

## General Expense:

Salaries .....	1,740.00
Office Expense.....	120.00
Stationery and Ad.....	366.72
Miscellaneous .....	341.00
<hr/>	
Total Expense.....	2,567.72
<hr/>	
Net Earnings.....	8,999.81
<hr/>	

Above does not include discounts, interests, office help, rent, and  
not a proper depreciation charge.

## EXHIBIT "A."

## Sheet 1-F.

*Gas Operating Statement for the Year Ended December 31, 1912.*

Compiled by Marwick, Mitchell, Peat & Co.

Book Value of Property and Plant.....	\$111,974.16
---------------------------------------	--------------

## Earnings:

Fuel Gas.....	\$18,898.01
Illuminating Gas.....	129.35
	<hr/>
	\$19,027.36

## Operating Expense:

Fuel—Boiler .....	\$1,474.50
Fuel—Retort .....	1,573.50
Fuel—Generator .....	7,246.37
Labor—Plant .....	1,605.00
Labor—Distribution .....	340.00
Water .....	124.13
Repairs .....	589.66
Taxes .....	671.52
Insurance .....	300.00
Depreciation .....	3,600.00
	<hr/>
	17,524.69

## Less:

Coke Sales.....	4,973.18
Tar Sales.....	483.36
	<hr/>
	5,456.54

Total Operating Expense.....	12,068.14
------------------------------	-----------

## General Expense:

Salaries .....	1,740.00
Office Expense.....	180.00
Stationery & Advertising....	310.02
Miscellaneous .....	339.90
	<hr/>
	2,569.92
	<hr/>
Net Earnings.....	\$14,638.06
	<hr/>
	4,389.30

The above does not show charge for light, interest, discounts, bad debts, nor fair depreciation charges.

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## EXHIBIT "A."

## Sheet 1-G.

*Gas Operating Statement for the Year Ended December 31, 1913.*

Compiled by Marwick, Mitchell, Peat &amp; Co.

Book Value of Property &amp; Plant..... \$115,702.67

Earnings:

Fuel Gas .....	\$22,065.87
Illuminating Gas .....	55.76
	<hr/>
	\$22,121.63

Operating expense:

Fuel:

Boiler .....	\$1,322.03
Resort .....	1,631.00
Generator .....	8,200.36

Labor:

Plan .....	2,100.00
Distribution .....	378.00
Water & Light .....	174.55
Repairs .....	744.73
Taxes .....	690.00
Insurance .....	300.00
Depreciation .....	7,200.00
	<hr/>
	22,820.67

Less:

Coke Sales .....	5,262.65
Tar Sales .....	116.55
	<hr/>
Total Operating Expense .....	17,448.47

General Expense:

Salaries .....	1,885.00
Office Expense .....	240.00
Stationery & Advertising .....	305.85
Miscellaneous .....	519.70
	<hr/>
Net Earnings .....	2,950.55
	<hr/>
	20,393.02
	<hr/>
Net Earnings .....	1,728.61

Above does not include interest, office rent, uncollectible bills, discounts, etc.

188

## EXHIBIT "A."

## Sheet 1-H.

*Gas Operating Statement for the Year Ended December 31st, 1914.*

Compiled by Marwick, Mitchell, Peat &amp; Co.

Book Value of Property &amp; Plant ..... \$119,332.54

## Earnings:

Fuel Gas .....	\$26,101.09
Illuminating Gas .....	31.36
	<hr/>
	\$26,132.45

## Operating Expense:

## Fuel:

Boiler .....	\$1,190.02
Retort .....	2,127.83
Generator .....	8,491.09

## Labor:

Plant .....	3,021.00
Distribution .....	595.00
Water & Light .....	127.85
Repairs .....	913.04
Taxes .....	790.40
Insurance .....	513.99
Depreciation .....	3,600.00
	<hr/>
	\$21,370.22

## Less:

Coke Sales .....	\$6,274.64
Tar Sales .....	351.46
	<hr/>
	6,626.10

Total Operating Expense ..... \$14,744.12

## General Expense:

Salaries .....	\$2,880.00
Office Rent .....	213.50
Stationery & Advertising .....	735.78
Miscellaneous .....	550.49
	<hr/>
	4,379.77

Total Expense ..... \$19,123.89

Net Earnings ..... \$7,008.56

Above does not include interest, discounts, bad debts, or sufficient depreciation charges.

189

## EXHIBIT "A."

## Sheet 1-J.

## St. Cloud Public Service Co.

*Gas Operating Statement for the Twelve Months Ended December 31, 1915.*

Book Value of Property &amp; Plant ..... \$123,046.53

## Earnings:

Gas Sales .....	\$27,461.67
Coke Sales .....	5,626.08
Tar Sales .....	503.54
	<hr/>
	\$33,536.46

## Operating Expenses:

## Production—

Labor .....	\$2,991.95
Fuel .....	10,363.64
Miscellaneous .....	8.30
Maintenance .....	499.12
	<hr/>

## Distribution—

Labor .....	\$480.35
Superintendence .....	405.00
Water & Light .....	121.78
Repairs .....	546.23
	<hr/>

## General Expense:

Insurance .....	\$1,050.00
Taxes .....	1,215.95
Depreciation .....	3,775.00
Clerical Salaries .....	2,290.62
Office Supplies, Stat'y & Advertising .....	662.45
Office Rent .....	210.00
Automobile Expense .....	196.70
Telephone & Telegraph .....	49.47
Miscellaneous Gen. Exp. ....	553.76
	<hr/>
	\$10,003.95

Total Expense ..... \$25,420.32

Net Earnings ..... \$8,170.97

During year our net for merchandise sales ..... \$54.63  
 Interest at 8% on \$123,046.53 ..... 9,843.72

Depreciation should be 5% instead of 2.9% as shown by books, in our judgment.

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## EXHIBIT "A."

## Sheet 1-K.

St. Cloud Public Service Company.

*Gas Operating Statement for the Twelve Months Ended December 31st, 1916.*

Book Value of Plant ..... \$150,728.01

## Earnings:

Gas Sales .....	\$27,368.59
Coke Sales .....	408.53
Tar Sales .....	179.20

\$28,456.32

## Operating Expenses:

## Productions—

Labor .....	\$3,173.23
Fuel .....	6,346.87
Maintenance .....	347.94
Miscellaneous .....	97.66

\$9,965.70

## Distribution—

Labor .....	\$511.46
Superintendence .....	619.38
Water & Light .....	165.00
Repairs .....	257.43
Miscellaneous .....	230.73

\$1,784.00

## General Expense:

Insurance .....	\$952.70
Taxes .....	1,200.00
Depreciation .....	3,600.00
Clerical Salaries .....	1,832.23
Office Supplies, Stat'y Postage & Advertising	769.80
Automobile Expense ...	108.97
Office Rent .....	582.79
Telephone & Telegraph ..	116.79
Miscellaneous Gen. Exp.	741.25
Manager's Salary .....	572.00

\$10,476.53

Total Expense .....

\$22,226.23

Net Earnings .....

\$6,230.00

During year our net for merchandise sales was equal to  
Interest at 8% on \$150,728.01 is equal to .....

Depreciation should be 5% instead of 2.4% as shown by books, in  
our judgment.

## EXHIBIT "A."

## Sheet 1-L.

St. Cloud Public Service Company.

*Gas Operating Statement for the Twelve Months Ended December 31st, 1917.*

Value of Property &amp; Plant ..... \$159,755.01

## Earnings:

Gas Sales .....	\$30,132.55
Coke Sales .....	1,229.40
Tar Sales .....	164.26

\$31,526.21

## Operating Expenses:

## Production—

Labor .....	\$3,432.45
Fuel .....	13,705.17
Maintenance .....	339.68
Miscellaneous .....	502.79

\$17,980.09

## Distribution—

Labor .....	\$896.40
Superintendence .....	939.03
Water & Light .....	120.00
Repairs .....	317.28
Miscellaneous .....	160.73

\$2,433.44

## General Expense:

Insurance .....	\$1,215.00
Taxes .....	1,800.00
Depreciation .....	7,200.00
Clerical Salaries .....	1,083.69
Office Supplies, Stat'y Postage & Advertising	622.02
Office Rent .....	762.97
Automobile Expense ...	281.21
Telephone & Telegraph ..	130.40
Miscellaneous Gen. Exp.	537.17
Manager's Salary .....	888.69
Uncollectible Bills .....	300.00

## Meter Reading &amp; Collecting .....

229.84

\$15,050.99

Total Expense .....

\$35,464.52

Net Earnings .....

\$3,938.31\*

[\*In red in copy.]

During year our net for merchandise sales .....	\$493.59
Interest at 8% on \$159,755.01 .....	12,780.40

Depreciation should be 6% instead of 4.5% as shown by books, in our judgment.

192

## EXHIBIT "A."

## Sheet 1-M.

St. Cloud Public Service Co.

*Gas Operating Statement for the Twelve Months Ended December 31st, 1918.*

Book Value of Property & Plant .....	\$163,961.56
--------------------------------------	--------------

## Earnings:

Gas Sales .....	\$32,402.40
Coke Sales .....	670.15
Tar Sales .....	67.18
	—————
	\$32,825.40

## Operating Expenses:

Production—

Labor .....	\$5,483.29
Fuel .....	22,036.73
Maintenance .....	963.21
Miscellaneous .....	767.48
Purification Sup. & Eqp. .....	318.09
	—————
	\$29,569.80

## Distribution—

Labor .....	\$521.73
Superintendence .....	1,149.26
Water & Light .....	120.37
Repairs .....	711.34
Miscellaneous .....	555.44
	—————
	\$3,058.14

## General Expense:

Insurance .....	\$1,185.00
Taxes .....	1,800.00
Depreciation .....	8,250.00
Clerical Salaries .....	1,345.32
Office Supplies, Staty. Postage & Advertising .....	602.96
Office Rent .....	501.41
Automobile Expense ....	694.90
Telephone & Telegraph .....	90.10
Miscellaneous Gen. Exp. ....	212.25
Manager's Salary .....	806.64
Meter Reading & Collecting .....	306.38
Uncollectible Bills .....	300.00
	—————
	\$16,094.86
Total Expense .....	\$42,722.80
Net Earnings .....	\$15,897.40*

During year our net for merchandise sales .....

Interest at 8% on \$168,931.56 .....

Depreciation should be 7.5% instead of 4.3%, as shown by books, in our judgment.

193

## EXHIBIT "A."

## Sheet 1-N.

St. Cloud Public Service Co.

*Gas Operating Statement for the Twelve Months Ended December 31st, 1919.*

Book Value of Property & Plant .....	\$189,981.56
--------------------------------------	--------------

## Earnings:

Gas Sales .....	\$35,505.62
Coke Sales .....	1,572.36
Tar Sales .....	418.85
	—————
	\$37,496.83

## Operating Expenses:

Production—

Labor .....	\$5,649.96
Fuel .....	20,131.14
Maintenance .....	1,337.33
Purification Supplies .....	651.96
Miscellaneous .....	1,328.33
	—————
	\$29,098.72

[\*In red in copy.]

## Distribution—

Labor .....	\$650.41
Superintendence .....	1,203.84
Water & Light .....	377.56
Repairs .....	1,260.58
Miscellaneous .....	214.92
Installing & Remvg. Meters .....	429.36
	<u>\$4,136.67</u>

## General Expenses:

Insurance .....	\$1,224.60
Taxes .....	2,396.70
Depreciation .....	16,800.00
Clerical Salaries .....	1,454.97
Office Supplies, Staty. Postage & Advertising	812.73
Office Rent .....	264.05
Automobile Expense .....	242.93
Telephone & Telegraph .....	136.05
Manager's Salary .....	927.50
Meter Reading & Collecting .....	378.67
Uncollectible Bills .....	300.00
Miscellaneous .....	453.04
	<u>\$25,391.24</u>
Total Expense .....	<u>\$58,626.63</u>
Net Earnings .....	<u>\$21,129.80*</u>

During year our net for merchandise sales ..... \$2,951.79  
 Interest at 8% on \$189,981.56 ..... 15,198.48

Depreciation should be 10% instead of 8.6%, as shown by books, in our judgment.

## EXHIBIT "A."

## Sheet 1-P.

St. Cloud Public Service Co.

*Gas Operating Statement for the Eight Months Ended August 31st,  
1920.*

Book Value of Property & Plant ..... \$194,057.03

## COMPARATIVE

21 M

	1919	1919	1919	1919	1919	1919
	Jan.	Feb.	Mar.	Apr.	May	June
<b>EARNINGS</b>						
Gas Sales	\$2275.18	2542.96	2431.84	2771.75	27	
Coke Sales	206.21	497.56	284.70	9.73	5	
Tar Sales	6.10	132.32	8.55	11.00	3	
Merchandise Sales	205.53	24.21	26.58	622.85	1	
<b>Total</b>						
	<u>2281.96</u>	<u>3148.63</u>	<u>2698.51</u>	<u>2169.63</u>	<u>37</u>	
<b>EXPENSES</b>						
<b>Production - Coal Gas</b>						
501 Labor	508.90	555.10	540.31	553.25	5	
502 Fuel - Boilers - Coal	28.96					
503 Fuel - Boilers - Coke	455.90	556.43	751.20	319.11	1	
504 Fuel - Benches - Coke	513.51	483.78	586.64	660.42	7	
506 Coal Carbonised	668.71	631.11	760.21	690.71		
508 Water and Light	10.00	10.00	10.00	10.00		
509 Purification Expense	23.72	8.80	17.03			
516 M'tce. & Repairs Bldgs. & Grounds	8.87	14.88	14.08	44.17		
517 M'tce. & Repairs Machy & Equipment	147.73	88.23	25.17	44.28	1	
520 Sickness & Leave of Absence						
521 Miscellaneous	106.87	71.60	25.66	94.60		
<b>Total</b>						
	<u>2473.17</u>	<u>2419.93</u>	<u>2730.30</u>	<u>2416.54</u>	<u>23</u>	
<b>Production - Water Gas</b>						
526 Labor	6.93					
527 Fuel Used - Generator Coal	18.80					
528 Fuel Used - Generator Coke	6.55					
529 Fuel Used - Generator Oil	13.75					
531 Water and Light						
532 Purification Expense						
541 M'tce. & Reprs. Bldgs. & Grounds	4.60					
542 M'tce. & Reprs. Machy & Equipmt	18.81					
545 Sickness & Leave of Absence						
546 Miscellaneous	7.30					
<b>Total</b>						
	<u>76.74</u>					
		<u>72.25</u>				
			<u>197.17</u>			

[\*In red in copy.]

## ST. CLOUD PUBLIC SERVICE COMPANY

## GAS DEPARTMENT

## COMPARATIVE STATEMENT OF EARNINGS &amp; OPERATING EXPENSES

21 Months Ending September 30, 1920.

	1919	1919	1919	1919	1919	1919	1919	1919	1919	1920	1920	1920
	Apr.	May	June	July	August	Sept.	Oct.	Nov.	Dec.	Jan.	Feb.	Mar.
1	2771.75	2786.52	3323.38	3087.95	3045.24	3377.13	3368.75	3341.37	3163.55	3143.27	2895.11	3111.44
2	9.73	560.38	9.48	135.21	95.67	36.18	119.87	327.92	109.07	30.58	29.60	26.98
3	11.00	322.25	36.32	6.15	120.04			258.65	409.89			7.80
4	622.85	122.45	402.44	45.74	236.04	174.22	682.76	1206.97	1400.26	21.83	67.11	151.30
.	2169.63	3791.60	3680.02	2913.15	3496.99	3166.73	3921.64	5134.91	4044.85	3198.68	2857.60	3297.52
1	553.25	509.44	510.27	179.27								
2	319.11	126.20	103.14	36.40								
3	660.42	719.74	484.15	99.18								
4	690.71	728.65	625.62	192.82								
5	10.00	10.00	10.00	10.00								
6		29.95	26.02	23.40								
7	44.17	17.01	10.81									
8	44.28	116.98	82.18	25.31								
9				15.57								
10	94.60	76.58	39.58	54.77								
11	2416.54	2334.55	1891.77	636.72								
12	8.22	78.22	234.82	339.26	360.73	408.78	418.07	438.39	411.93	379.76	404.46	
13	8.42	64.14	160.00	245.00	250.72	289.52	295.50	89.72	378.48	383.46	407.11	
14	9.85	95.98	446.32	398.47	562.85	640.84	651.36	636.88	633.53	578.68	646.30	
15	10.00	145.70	511.31	740.93	752.50	790.27	850.84	1222.33	956.53	1015.91	1254.00	
16		2.80		10.00	10.00	76.40	198.36		729.10	93.00	126.20	
17	156.28	12.49		5.80	17.40	5.60	12.14	247.05	48.94	17.83	25.86	
18			2.00		1.68	15.67	36.57	78.35	8.30	13.49	20.23	
19	4.40	20.66		6.50	38.86	72.84	48.07	63.21	279.44	289.44	177.93	54.23
20				15.81	39.33			52.73	3.17	65.51	35.09	
21				10.66	54.73	44.21	150.12	99.20	99.33	111.34	158.34	234.99
22	197.17	34.12	451.26	1405.16	1944.25	2167.25	2308.08	2515.43	3401.59	3694.41	2899.09	3075.48

## COMPARATIVE STATEMENT

21 M

<u>EXPENSES</u>	(continued)	1919	1919	1919	1919
<u>Distribution</u>		Jan.	Feb.	Mar.	Apr.
551	Superintendence	80.00	80.00	80.00	80.00
552	Removing & Resetting Meters	24.74	29.71	12.87	32.25
553	Complaints - Labor	55.59	11.09	22.94	43.90
554	Complaints - Material	2.53			
561	Mtce. & Repairs - Mains		11.94		369.16
562	Mtce. & Repairs - Services	.40	.40	7.02	46.89
563	Mtces. & Repairs - Meters	50.13	30.85	103.54	58.44
564	Thawing Device	3.00	29.71	32.86	
570	Miscellaneous	7.26	.79	11.28	
	Total	223.65	194.59	270.51	630.64
<u>General</u>					
571	Managers Salary	75.00	75.00	75.00	77.50
572	Clerical Salaries	127.21	110.00	95.00	93.65
573	Telephone & Telegraph	9.75	10.50	8.95	8.00
574	Canvassing & Advertising	.21	6.30	11.54	67.69
575	Office Rent, Light & Heat	62.79	68.62	11.34	4.98
576	Stationery & Postage	50.00	50.00	50.00	50.00
577	Meter Reading & Collecting	30.53	40.64	35.03	36.37
578	Uncollectable Bills	25.00	25.00	25.00	25.00
579	Auto & Team Expense	70.10	13.13	69.64	72.99
580	Injuries & Damages				
581	Waiting for Orders				
582	Gratuities				
583	Miscellaneous	.71	13.49	3.22	19.66
584	Insurance	100.00	100.00	120.00	120.00
585	Taxes	200.00	200.00	200.00	200.00
586	Depreciation	1000.00	1000.00	1000.00	1016.93
	Total	1751.30	1712.68	1704.77	1786.77

**ST. CLOUD PUBLIC SERVICE COMPANY**

## **GAS DEPARTMENT**

**COMPARATIVE STATEMENT OF EARNINGS & OPERATING EXPENSES (Continued)**

21 Months Ending September 30, 1920

VICE COMPANY  
MENT  
OPERATING

ber 30, 1920

Exhibit B  
Sheet 3

1919	1919	1919	1919	1919	1919	1920	1920	1920	.1920	1920	1920	1920	1920	1920
July	Aug.	Sept.	Oct.	Nov.	Dec.	Jan.	Feb.	Mar.	April	May	June	July	Aug.	Sept.
6.00	93.84	130.00	105.00	150.00	150.00	150.00	175.00	175.00	175.00	175.00	175.00	175.00	175.00	175.00
5.44	31.56	36.47	58.98	42.56	56.81	23.42	25.05	26.67	30.86	27.76	30.65	39.21	26.99	26.62
5.48	66.05	63.22	68.36	121.85	86.33	92.11	90.43	76.46	66.26	54.89	48.72	97.53	39.76	55.04
			1.91						.30		1.83			
		6.40		3.47	1.00	2.07	53.21	57.52		1.60				27.30
	3.74	37.59	47.42	40.84	23.34		2.75	2.22						
3.25	1.59	10.32	18.46	3.75	19.07	8.97			148.79	47.36	2.03	16.77	7.67	
				1.80	96.47	231.09	66.57	82.45				3.56	.46	
	1.95		.53	21.41	1.06		4.07	.58	1.60			10.45		51.24
5.17	198.73	284.53	321.54	365.33	433.02	511.73	413.50	421.92	424.12	306.71	286.86	371.61	279.52	335.28
7.50	77.50	77.50	77.50	80.00	80.00	117.50	117.50	117.50	117.50	117.50	117.50	117.50	117.50	117.50
5.70	123.41	132.76	178.43	126.26	115.19	109.96	98.13	118.36	117.77	97.16	90.00	82.50	75.00	75.00
5.50	16.75	35.30		11.35	9.95	28.35	10.75	10.25	11.00	11.75	10.25	11.00	15.20	18.45
	9.86	10.33	30.45	51.62	92.46	30.44	28.30	26.17	44.75	39.46	53.96	54.84	46.66	226.77
1.64	11.23	14.38	11.63	21.15	11.04	18.09	17.51	16.44	10.16	12.31	11.39	10.31	52.55	52.00
5.00	25.00	25.00	25.00	25.00	100.21	25.00	25.00	25.00	41.00	34.00	50.00	50.00	50.00	50.00
3.39	27.36	23.93	26.61	30.72	24.27	28.43	32.08	23.80	27.54	32.13	33.02	20.33	33.69	48.38
5.00	25.00	25.00	25.00	25.00	25.00	25.00	15.00	25.00	25.00	25.00	25.00	25.00	25.00	25.00
5.53	8.20	13.48	9.23	10.00	40.35	32.65	49.07	75.00	131.17	125.94	197.85	87.31	39.25	70.00
						1.05								20.28
							1.00	28.77	2.60					
								6.25						26.38
1.99	27.85	34.84	47.52	86.67	139.42	100.14	65.05	210.34					.80	
2.03	94.38	19.64	116.09	97.29	110.18	97.67	74.33	86.91	111.18	95.97	41.91	28.99	334.13	205.74
0.00	200.00	200.00	200.00	200.00	195.70	200.00	200.00	200.00	200.00	200.00	200.00	200.00	200.00	200.00
5.58	950.54	1000.00	1000.00	1900.00	4900.00	1000.00	1000.00	1000.00	1000.00	1300.00	1300.00	1300.00	1300.00	1300.00
0.30	1597.08	1612.16	1747.46	2665.06	5845.82	1814.23	1761.49	1944.12	1777.92	2174.57	2220.88	2.81.24	2398.40	2400.94

## COMPARAT

	1919	1919	1919	1919	1
	Jan.	Feb.	Mar.	Apr.	M
<b>EARNINGS</b>	<b>2281.96</b>	<b>3148.63</b>	<b>2698.51</b>	<b>2169.63</b>	<b>37</b>

EXPENSES

Production - Coal Gas	2473.17	2419.93	2730.50	2416.54	23
Production- Water Gas	<u>76.74</u>		<u>72.25</u>	<u>197.17</u>	
Total Production	2549.91	2419.93	2802.55	2613.71	23
Distribution	223.65	194.59	270.51	630.64	6
General	<u>1751.30</u>	<u>1712.68</u>	<u>1704.77</u>	<u>1786.77</u>	<u>38</u>
Total Expenses	4524.86	4327.20	4777.83	5031.12	47
<b>NET OPERATING LOSS</b>	<b>2242.90</b>	<b>1178.57</b>	<b>2079.32</b>	<b>2861.49</b>	<b>9</b>

## ST. CLOUD PUBLIC SERVICE COMPANY

GAS DEPARTMENT

## COMPARATIVE STATEMENT OF REVENUES &amp; OPERATING EXPENSES

21 Months Ended September 30, 1920

GRAND SUMMARY

	1919	1919	1919	1919	1919	1919	1919	1919	1920	1920	1920	1920	1920	1920	1920	1920
	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.	Jan.	Feb.	Mar.	April	May	June	July	
19	1919	1919	1919	1919	1919	1919	1919	1919	1920	1920	1920	1920	1920	1920	1920	1920
2.	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.	Jan.	Feb.	Mar.	April	May	June	July	
9.63	3791.60	3680.02	2913.15	3496.99	3166.73	3921.64	5134.91	4044.85	3195.68	2857.60	3297.52	4437.23	4139.24	4425.69	4168.32	4.
5.54	2334.55	1891.77	636.72													
7.17	34.12	451.26	1405.16	1944.25	2167.25	2308.08	2515.43	3401.59	3694.41	2899.09	3075.48	3351.00	3342.44	3727.16	3836.36	4.
5.71	2368.67	2343.03	2041.88	1944.25	2167.25	2308.08	2515.43	3401.59	3694.41	2899.09	3075.48	3351.00	3342.44	3727.16	3836.36	4.
0.64	492.43	178.97	165.17	198.73	284.53	321.54	365.33	433.02	511.73	413.59	421.92	424.12	306.71	286.86	371.81	4.
7.77	1881.48	1786.36	1300.30	1597.08	1612.16	1747.46	2665.06	5845.82	1814.23	1761.49	1944.12	1777.92	2174.57	2220.88	2081.24	2.
1.12	4742.58	4308.36	3507.35	3740.06	4063.94	4377.08	5545.82	9680.43	6020.37	5074.17	5441.52	5553.04	5823.72	6234.90	6289.41	6.
.49	950.98	628.34	594.20	243.07	897.21	455.44	410.91	5635.58	2824.69	2216.57	2144.00	1115.81	1684.48	1809.01	2121.09	2.

ICE COMPANY

12

OPERATING EXPENSES

30, 1920

*Rabbit B*  
Sheet 4

1919	1919	1919	1919	1920	1920	1920	1920	1920	1920	1920	1920	1920	
Sept.	Oct.	Nov.	Dec.	Jan.	Feb.	Mar.	April	May	June	July	Aug.	Sept.	
16.99	3166.73	3921.64	5134.91	4044.85	3195.68	2857.60	3297.52	4437.23	4139.24	4425.89	4168.32	4376.30	4235.22

4.25	2167.25	2308.08	2515.43	3401.59	3694.41	2899.09	3075.48						
4.25	2167.25	2308.08	2515.43	3401.59	3694.41	2899.09	3075.48						
8.73	284.53	321.54	365.33	433.02	511.73	413.59	421.92						
7.08	1612.16	1747.46	2665.06	5845.82	1814.23	1761.49	1944.12						
0.06	4063.94	4377.08	5545.82	9680.43	6020.37	5074.17	5441.52						
3.07	897.21	455.44	410.91	5635.56	2824.69	2216.57	2144.00						

3351.00	3342.44	3727.16	3836.36	4253.83	4716.99								
3351.00	3342.44	3727.16	3836.36	4253.83	4716.99								
424.12	306.71	286.86	371.81	279.52	335.28								
1777.92	2174.57	2220.88	2081.24	2396.40	2488.94								
5553.04	5823.72	6234.90	6289.41	6929.75	7541.21								
1115.81	1684.48	1809.01	2121.09	2553.45	3305.99								

ST. CLOUD PUBLIC SERVICE COMPANY

Statement of Estimated Value of Material and Supplies  
on hand.  
24 Months, ended Sept. 30th, 1920.

Month		Pipe	Fittings	Heaters	Stoves	Total
Sept.	1918	1700.00	350.00	700.00	1400.00	4150.00
Oct.	1918	1700.00	400.00	700.00	1400.00	4200.00
Nov.	1918	1700.00	400.00	700.00	1400.00	4200.00
Dec.	1918	1700.00	400.00	700.00	1400.00	4200.00
Jan.	1919	2500.00	800.00	700.00	1400.00	5400.00
Feb.	1919	2700.00	800.00	700.00	1400.00	5600.00
March	1919	2800.00	800.00	700.00	1400.00	5700.00
Apr.	1919	2800.00	900.00	700.00	1400.00	5800.00
May	1919	2800.00	800.00	800.00	1400.00	5700.00
June	1919	2800.00	800.00	800.00	1400.00	5700.00
July	1919	1800.00	500.00	800.00	1400.00	4500.00
Aug.	1919	1800.00	500.00	800.00	1400.00	4500.00
Sept.	1919	1800.00	500.00	800.00	1400.00	4500.00
Oct.	1919	1800.00	500.00	800.00	1400.00	4500.00
Nov.	1919	1700.00	500.00	800.00	1400.00	4400.00
Dec.	1919	1700.00	500.00	800.00	1400.00	4400.00
Jan.	1920	1800.00	500.00	800.00	1400.00	4500.00
Feb.	1920	1700.00	500.00	800.00	1400.00	4400.00
Mar.	1920	1700.00	500.00	800.00	1400.00	4400.00
Apr.	1920	2400.00	500.00	800.00	1400.00	5100.00
May	1920	2000.00	500.00	800.00	3700.00	7000.00
June	1920	1900.00	500.00	800.00	3750.00	6050.00
July	1920	1500.00	500.00	800.00	2600.00	5400.00
Aug.	1920	1400.00	500.00	800.00	2000.00	4700.00
Sept.	1920	1400.00	300.00	850.00	1350.00	3900.00

NOTE:

During this period we have been buying pipe-fittings from hand to mouth, so to speak, and in our judgment the amount carried is only half what it should be. During this period we carried pipe and fittings to run house services only and haven't any pipe on hand for extended lines, a certain amount of which we should always carry under favorable conditions.

## SAINT CLOUD PUBLIC SERVICE COMPANY

GAS DEPARTMENT

STATEMENT SHOWING QUANTITY & VALUE OF STOCK OF COAL, COKE, AND GAS OIL ON  
THE END OF EACH MONTH FROM SEPTEMBER 30th, 1918 TO AUGUST 31st,

C O A L				C O K E			
MONTH & YEAR	QUANTITY	PRICE PER TON	AMOUNT	QUANTITY	PRICE PER TON	AMOUNT	
	TONS POUNDS			TONS POUNDS			
<u>1918</u>							
Sept.	565 940	8.40	\$4749.95	8 1770	8.40	74.63	
Oct.	337 1615	8.40	2837.58	18 578	8.40	153.63	
Nov.	181 1816	8.40	1528.02	9 450	8.40	77.49	
Dec.	68 1050	8.40	575.61	20 95	8.40	168.40	
<u>1919</u>							
Jan.	101 50	8.40	848.61	56 1370	8.40	476.15	
Feb.	122 750	8.45	1034.07	82 430	8.45	694.72	
March	71 925	8.45	603.86	80 1605	8.45	682.78	
April	97 1225	8.42	821.90	122 26	8.42	1,027.35	
May	188 1655	8.42	1000.53	182 1626	8.42	1,539.29	
June	150 1425	8.42	1269.00	171 821	8.00	875.76	
July	132 325	8.00	1057.30	109 941	8.00	402.52	
Aug.	101 1100	8.00	812.40	50 631	9.70	538.84	
Sept.	224 120	8.00	1792.48	55 1101	11.50	818.63	
Oct.	215 1740	8.00	1726.96	71 370	11.50	857.32	
Nov.	268 1295	8.30	2229.77	74 1100	11.50	850.25	
Dec.	187 1895	8.30	1559.88	73 1870	11.50		
<u>1920</u>							
Jan.	173 235	8.30	1436.88	97 5	11.50	1115.53	
Feb.	206 1935	8.30	1717.83	102 1515	11.50	1181.71	
March	359 195	8.30	2980.51	62 535	11.50	716.08	
April	329 1195	8.30	2735.66	105 445	11.50	1210.06	
May	327 1315	10.35	3391.25	110 705	13.47	1486.45	
June	323 135	11.10	3586.05	75 3	13.50	1012.52	
July	307 1495	12.10	3723.74	106 923	16.05	1708.73	
Aug.	357 735	13.14	4695.81	101 918	16.05	1628.41	

SAINT CLOUD PUBLIC SERVICE COMPANY

GAS DEPARTMENT

LOWING QUANTITY & VALUE OF STOCK OF COAL, COKE, AND GAS OIL ON HAND AS AT  
END OF EACH MONTH FROM SEPTEMBER 30th, 1918 TO AUGUST 31st, 1920

C O K E

O I L

		<u>QUANTITY</u>	<u>PRICE</u>	<u>AMOUNT</u>	<u>QUANTITY</u>	<u>PRICE</u>	<u>AMOUNT</u>	
		TONS POUNDS	PER TON		GALLONS	PER GALLON		&
95	8	1770	8.40	74.63	7651	.10	765.10	During the period above we have kept our stock of coal Coke and Oil much lower than they should have been necessary on account of our not being in position to carry interest charges on a proper stock account.
58	18	578	8.40	153.63	3331	.10	333.10	
02	9	450	8.40	77.49	7826	.10	782.60	
61	20	95	8.40	168.40	6591	.10	659.10	
61	56	1370	8.40	476.15	6481	.10	648.10	
07	82	430	8.45	694.72	6481	.10	648.10	not being in position to carry
86	80	1605	8.45	682.78	6481	.10	648.10	interest charges
90	122	26	8.42	1,027.35	6381	.10	638.10	on a proper stock account.
53	182	1626	8.42	1,539.29	6381	.10	638.10	
00	171	821	8.42	1,443.28	4906	.10	490.60	In our judgement to ensure continuity of service
30	109	941	8.00	875.76	12635	.10	1263.50	we should carry
40	50	631	8.00	402.52	11286	.10	1128.60	approximately the following stock
48	55	1101	9.70	538.84	15831	.09 <sup>1</sup> / <sub>2</sub>	1464.37	of Coal, Coke & Oil:
96	71	370	11.50	818.63	7582	.09 7/8	748.73	
77	74	1100	11.50	857.32	14894	.10	1489.40	
88	73	1870	11.50	850.25	18723	.11 7/8	2223.36	
88	97	5	11.50	1115.53	6398	.13 3/10	850.93	COAL: \$ 400 tons 5432.00
63	102	1515	11.50	1181.71	14425	.10	1442.50	COKE
61	62	535	11.50	716.08	9073	.14 1/8	1300.46	250 tons 4625.00
66	105	445	11.50	1210.06	14089	.12 6/10	1775.21	
25	110	705	13.47	1486.45	10145	.15 6/10	1582.62	OIL
05	75	3	13.50	1012.52	7503	.13 5/8	1022.28	20000 Gal 3300.00
74	106	923	16.05	1708.73	2288	.12	274.56	
61	101	918	16.05	1628.41	14317	.12 1/8	1735.93	

Total \$ 13357.00

## ST CLOUD PUBLIC SERVICE COMPANY

## BALANCE SHEET

as at August 31-1920

ASSETS

Property and Plant Investment	\$3,959.902.83
-------------------------------	----------------

Current & Working Assets

Pay Roll Reserve	900.00
Cash on Hand and in banks	- -
Notes Receivable	9,810.18
Accounts Receivable:	
Consumers	99,022.14
Affiliated Companies	2,032.50
Supplies	<u>25,465.28</u>
	137,230.10

Deferred Assets

Suspense Account	5,147.60
Insurance Unexpired	2,459.46
Interest Prepaid	648.63
Advance Expense Accounts	1,065.00
Miscellaneous	<u>1,266.78</u>
	10,587.47

Miscellaneous Assets

Investments	5,201.00
Treasury Bonds	56,700.00
Treasury Stock	63,000.00
Sinking Fund	<u>42,224.79</u>
	167,125.79

CAPITAL LIABILITIES:

Capital Common Stock	
Capital First Preferred	
Capital Second Preferred	

First Mortgage 6% Gold	
------------------------	--

Total Capital	
---------------	--

Current Liabilities

Bank Overdrafts	
Notes Payable	
Accounts Payable:	
Trade	
Payrolls (current)	
Affiliated	
Companies	206
Officers	45

Meter Deposits	
Unclaimed Wages	
Line Extension Ledger	

Deferred Liabilities

Suspense Accounts	
Taxes Accrued	
Deferred Payment Stock	
Interest on Bonds	
City Water Rental	

Reserve Accounts

Depreciation	
Amortization	
Miscellaneous	

Surplus Account

TOTAL ASSETS

4,274,846.19

TOTAL LI

## SERVICE COMPANY

Exhibit "B"  
Sheet 7

## SHEET

August 31-1920

## ASSETS

## CAPITAL LIABILITIES:

Property and Plant Investments

Capital Common Stock	\$1,000,000.00
Capital First Preferred Stock	252,100.00
Capital Second Preferred Stock	250,000.00

Current & Working Assets

First Mortgage 6% Gold Bonds	<u>1,869,400.00</u>
Total Capital Liabilities	3,371,500.00

Pay Roll Reserve

Cash on Hand and in bank

Notes Receivable

Accounts Receivable:

Consumers

Affiliated Companies

Supplies

Current Liabilities

Bank Overdrafts	4,290.35
Notes Payable	160,157.35
Accounts Payable:	
Trade	8,016.08
Payrolls (current)	8,309.37
Affiliated	-
Companies	208,009.10
Officers	<u>49,368.57</u>
	273,703.12
Meter Deposits	3,725.76
Unclaimed Wages	23.47
Line Extension Ledger	<u>5,491.27</u>
	447,391.31

Deferred Assets

Suspense Account

Insurance Unexpired

Interest Prepaid

Advance Expense Accounts

Miscellaneous

Deferred Liabilities

Suspense Accounts	836.62
Taxes Accrued	15, 186.56
Deferred Payment Stock Sales	3, 219.35
Interest on Bonds	37, 922.50
City Water Rental	<u>212.95</u>
	57,377.98

Reserve Accounts

Depreciation	286,700.55
Amortization	44,717.18
Miscellaneous	<u>5,100.95</u>
	336,518.68

Surplus Account

62,058.28

TOTAL ASSETS

TOTAL LIABILITIES

4,274,846.1

## Earnings:

Gas Sales .....	\$27,739.65
Coke Sales .....	91.91
Tar Sales .....	46.05
	<u>\$27,877.61</u>

## Operating Expenses:

## Production—

Labor .....	\$3,306.78
Fuel .....	20,812.62
Maintenance .....	1,398.22
Purification supplies .....	178.91
Miscellaneous .....	1,262.02
	<u>\$26,958.55</u>

## Distribution—

Labor .....	\$568.29
Superintendence .....	1,375.00
Water & Light .....	407.30
Repairs .....	833.36
Miscellaneous .....	213.92
Removing & Resetting Meters .....	239.61
	<u>\$3,637.48</u>

## General Expenses:

Insurance .....	\$712.67
Taxes .....	1,600.00
Depreciation .....	9,200.00
Clerical Salaries .....	788.88
Office Supplies, Staty.	
Postage & Advertising	624.58
Office Rent .....	158.36
Automobile Expense .....	738.74
Telephone & Telegraph .....	108.55
Manager's Salary .....	940.00
Meter Reading & Col. ....	239.02
Uncollectible Bills .....	190.00
Miscellaneous .....	870.05
	<u>\$16,170.85</u>

Total Expense .....

\$46,766.28

Net Earnings .....

\$18,889.27\*

During 8 months our net for merchandise sales .....

\$2,411.14

Interest at 8% on \$194,057.03 .....

10,350.00

Depreciation should be 10% instead of 7.8% as shown by books,  
in our judgment.(Here follow Exhibits B, C, D and E, marked pages 195-200, in-  
clusive.)

[\*In red in copy.]

## EXHIBIT "F."

Sheet 8.

St. Cloud Public Service Co.,  
Gas Department.

*Estimated Balance Sheet as at August 31, 1920.*

**NOTE.**—These figures have been extracted from the General Balance Sheet of the Company and the Marwick Mitchell & Peat reports to the best of our ability and belief.

## Assets.

Property & Plant (Book Value).....	\$194,057.0
Supplies .....	11,960.1
Accounts Receivable (Estimated).....	4,000.0
Surplus Accounts (Loss according to books).....	28,708.1
	<hr/>
	\$238,725.3

## Liabilities.

First Mortgage Bonds (Pro rata) Based on J. G. White & Co. & C. W. Humphrey's engineering reports of 1915 when When bonds amounting to \$800,000.00 were taken down and sold .....	\$114,100.00
First mortgage bonds (pro rata) cov- ering additions and betterments August 18, 1915 to August 31, 1920	\$57,900.00
Reserve for depreciation .....	<hr/> \$172,000.0 66,725.3 <hr/> \$238,725.3

The above figures are part correct and a portion estimated. The property and plant account does not include the overhead costs, no all of the taxes—no interest—no discount on Bonds, either issued no bond and legal expense or engineering charges, nor cost of fitting mains, etc., etc. If proper charges were made, this account would be, in the writer's opinion, fully \$250,000.00.

## EXHIBIT "G."

Sheet 9.

St. Cloud Public Service Co.,  
Gas Department.

*Statement Showing Original Cost of Property & Plant as at August 31, 1920.*

Description of property & plant owned and located on lots numbered nine (9) and ten (10), in block numbered four (4), in the town of St. Cloud, according to the John L. Wilson plat and survey thereof, on file and of the records in the office of the register of deeds in and for Stearns County, Minnesota.

Original cost.
\$66,685.21
5,046.17
69,633.73

Mains .....	\$66,685.21
Buildings .....	5,046.17
Gas Plant & Holders .....	69,633.73

(This includes the old plant, consisting of the gas machinery, tank holder, mains and house connections at \$29,875.54. Some of this property is still in use.)

Meters .....	12,824.62
Service Connections .....	32,103.59
Tools and Implements .....	6,840.21
Gas Arc Lamps .....	174.95
Carburetting Gas Plant .....	10,748.55
Total .....	<hr/> \$194,057.03

The above does not include anything for overhead made up of the following:

- Interest during construction.
- Taxes or Insurance.
- Discount on Bonds.

All of the personal expenses of the President on various trips to Chicago and Minneapolis in arranging with engineers, selling of bonds, buying material, etc.

No charge for any of the bookkeeping or office rent.

No charge for general superintendence of the President and Manager during construction.

In other words, the above represents the bare cost of the machinery, materials, etc., bought for the purpose of assembling this gas plant.

I doubt if even the freight was charged, but I am not looking this up at this time.

The plant was started early in the spring of 1906 and gas turned on about December of that year. No charge is made for the filling

of the gas mains, nor for the material, supplies, fuel, etc., on hand to start the plant. The first \$50,000 in bonds sold on account of the building of this plant was a 5% bond dated, I believe, about December 1905, due in thirty years, payable serially and the discount was 15% on the bonds and a bonus of 10% in stock afterward re-purchased by us at 50% of face value. The bonds were called

in 1915 and a premium of 5% paid. All other bonds sold 203 for the completing and additions to this plant under the old Trust Deed were sold at 80¢ on the dollar with a 10% stock bonus, stock being bought back on same basis and retired on same basis. In 1915 when the Company was re-financed, the bonds were sold at 90¢. There were very heavy charges in connection with the first Trust Deed of December 1905 in the way of lawyers, engineering, etc., and extremely heavy expenses in connection with the engineering, i. e. three different firms of engineers, and attorneys there being in reality three different firms of attorneys doing and passing on this work, each firm representing a different bond house and I am safe in saying that these total costs, including the securing of printing, lithographing, etc., is considerably in excess of \$30,000.

From the above you will note buildings \$5,046.17. This covers only certain changes that were made to the building by enlarging its foundations, etc., and does not include any part of the real estate or any part of the building that was then on the ground.

FIVE YEARSCOAL GAS

Period	Cubic Feet Per pound of coal carbonized (Cubic Feet)	Coke Used Per 1000 Cubic feet of coal gas made (Pounds)
--------	--	--

Year Ended Dec. 31, 1915	5.68	37.73
" " " 31, 1916	5.45	51.39
" " " 31, 1917	5.18	45.10
" " " 31, 1918	5.99	45.45
" " " 31, 1919	4.98	53.30
<b>9 Months Sept. 30, 1920</b>		

(Here follow Exhibits H, J, K, L, marked pages 204-209, inclusive.)

CLOUD PUBLIC SERVICE COMPANY

OPERATING STATISTICS

EMBER 31, 1919 & NINE MONTHS ENDED SEPT. 30, 1920

W A T E R   G A S

Tar Made Per ton of coal carbonized (Gallons)	Coal Used by boiler per 1000 cubic feet of coal gas made (Pounds)	Coke used by boiler per 1000 cubic feet of coal gas made (Pounds)	Coke used by gen- erator per 1000 cubic feet of water gas made	Oil Used Gallons per 1000 cubic feet of water gas made	Boiler Fuel Coal per 1000 cubic feet of water (Gallons)	Boiler Fuel Coke per 1000 cubic feet of water (Pounds)
---	---	---	--	---	--	---

Depends upon  
quality of coke.

13.04	9.86 plus	13.17	38.88	3.39	7.93	plus	38.88
13.75	12.38 plus	8.35	47.40	3.82	31.0	plus	7.57
1300	13.68 plus	11.76	42.94	3.89	48.3	plus	7.62
11.75	15.54 plus	10.33	43.40	3.42	50.8	plus - none, coal che-	
12.97	14.18	4.06	39.92	4.34	25.6	plus	13.99
			44.13	3.97	32.9	plus	none-coal cheaper

ST. CLOUD PUB

OPERATION

21 Months Ended

- - -

## COAL GAS

Ton of cubic feet of coal carbo- nized (Cubic Feet)	Per 1000 cubic feet of gas made (Pounds)	Per ton of coal carbon- ized (Pounds)
Bench Fuel Coke	Coke Made	

## 1919

January	5.08	49.29	1271
February	5.00	49.83	1292
March	4.53	55.16	1432
April	4.92	61.02	1300
May	5.03	63.22	1300
June	4.38	49.48	1300
July	4.79	32.56	1300
August			
September			
October			
November			
December			

## 1920

January
February
March
April
May
June
July
August
September

er Fuel used for coal gas plant, January, February and March 1919, large Electrical Department. Under Water Gas and Coke for generator, we cannot coke was also used for heating purposes in the boiler. Neither can we s ber 1, 1917, until October 1, 1919, we had a man in charge of the gas pl ed manufacturer. More coke is used on account of the poor quality. We c t is much more than it should be.

## WATER GAS

Fuel Used Coal	Generator Coke	Oil Used Gallons	Boiler Fuel Coal	Boiler Fuel Coke
Per 1000 cubic feet	Per 1000 cubic feet	Per 1000 cu. ft. of water gas made	Per 1000 cu. ft. of water gas made	Per 1000 cu. ft. of water gas made
36.89	6.45			
38.86	1.75			
49.58	3.17			
29.48		96.60	4.13	82.64
7.50	3.58			
	10.54	61.61	3.93	41.21
9.35	2.63	49.32	4.40	21.54
		35.47	4.50	23.09
		33.10	3.94	21.38
		41.19	4.10	26.05
		43.04	5.04	27.62
		44.52	4.82	33.87
		45.09	5.00	37.32
		40.91	4.11	37.56
		45.03	4.26	40.00
		42.39	4.11	39.81
		40.58	4.11	30.31
		43.21	3.46	29.42
		47.08	3.65	29.07
		41.15	3.57	28.97
		43.54	3.85	30.42

45.09	5.00	37.32
40.91	4.11	37.56
45.03	4.26	40.00
42.39	4.11	39.81
40.58	4.11	30.31
43.21	3.46	29.42
47.08	3.65	29.07
41.15	3.57	28.97
43.54	3.85	30.42

which we believe is due to heating the building, including on for 96.69# for April unless it is possible that a part of coke being 61.61#. I will say, however, that from the period distribution man but actually lacked the proper experience as he 82.64# of coal used as boiler fuel, water gas for April,

## ST. CLOUD PUBLIC SER

GAS DEPARTMENT

## COMPARATIVE STATEMENT SHOWING MARKET

Month & Year	COAL			Fr. per ton	Handling per ton
	Price per ton f.o.b. Superior	Price per ton f.o.b. Superior	Frt. per ton		
	Yough. Lump	Elkhorn Lump	Handling per ton		
1914					
Feb. 2	\$3.55	1-1-14 \$4.05	\$1.05	10%	
		3-1-14 3.80			
		6-1-14 3.55			
1915					
3-1	3.30	3-1 3.80		15%	
7-15	3.40	5-1 3.65			
		6-1 3.80			
1916					
1-1	3.65	1-1 3.80		20%	
9-1	3.90	4-1 3.85			
10-1	4.00	5-1 4.00			
10-24	4.25	9-1 4.25			
11-15	5.50	10-4 4.35			
1		10-24 4.60			
1917					
1-1	5.50	1-1 4.50	1.24	30%	
8-7	7.00	8-7 6.00			
11-1	6.60	11-1 7.20			
12-9	6.18				
1918					
1-1	6.18	1-1 7.20		45%	
3-13	6.60	6-1 6.30			
6-1	5.80	9-20 6.68			
8-21	6.18				
1919					
5-1	5.65	2-20 5.68	1.55	60%	
6-9	5.35	5-1 6.00			
6-24	5.50	5-3 6.25			
8-1	5.75	9-15 6.50			
9-15	6.00	10-1 6.75			
10-1	6.25	10-30 8.00			
10-30	6.50				
1920					
2-13	6.50	2-13 8.00			
4-28	8.00	5-11 9.50			
5-11	8.25	6-1 9.75			
6-1	8.75	6-29 10.25	2.08 $\frac{1}{2}$	35%	
6-29	9.25	7-12 10.75			
8-12	9.75	8-25 11.75			
8-25	10.75	9-7 12.00			
9-7	11.00	9-10 12.30			
9-10	11.30	9-25 13.50			
9-13	12.60	10-6 14.00			
9-23	13.50				
10-6	14.00				

L O I L

Arr'ton	Handling per ton	Price per gal. f.o.b Group 3 Oklahoma	Oil Fr't. per gal & per cwt.
1-1-14	3 $\frac{1}{2}$	3.1 $\frac{1}{2}$	
4-1-14	3 $\frac{1}{2}$		
5-1-14	2 $\frac{1}{2}$		
6-1-14	2 $\frac{1}{2}$		
8-1-14	1 7/8 $\mu$		
1-1	2 $\mu$		
2-1	1 $\frac{1}{2}$		
4-1	1 $\mu$		
5-1	1 3/4 $\mu$		
6-1	1 $\mu$		
7-1	1 $\frac{1}{2}$		
9-1	1 7/8 $\mu$		
1-1 -16	5 $\mu$		
2-1	1 $\frac{1}{2}$		
3-1	3 7/8 $\mu$		
4-1	1.2 $\mu$		
6-1	2 7/8 $\mu$		
8-1	2 $\frac{1}{2}$		
10-1	1 $\frac{1}{2}$		
2-1-17	2 7/8 $\mu$		
6-1	2 $\frac{1}{2}$		
8-1	3 7/8 $\mu$		
10-1	4 $\frac{1}{2}$		
12-1	5 $\frac{1}{2}$		
.08	45 $\mu$	1-1-18	6 $\mu$
.55	*	2-1	7 $\frac{1}{2}$
*	*	3-1	5 5/8 $\mu$
*	*	7-1	5 $\frac{1}{2}$
*	*	8-1	5 $\frac{1}{2}$
*	60 $\mu$	2-1-19	4 $\frac{1}{2}$
*	*	3-1	3 7/8 $\mu$
*	*	7-1	5 $\frac{1}{2}$
*	*	8-1	5 $\frac{1}{2}$
*	*	2-1-19	4 $\frac{1}{2}$
*	*	3-1	3 7/8 $\mu$
*	*	4-1	3 $\frac{1}{2}$
*	35 $\mu$	5-1	3 $\frac{1}{2}$
*	*	6-1	3 $\frac{1}{2}$
*	*	7-1	3 $\frac{1}{2}$
1.08 $\frac{1}{2}$	*	8-1	2 $\frac{1}{2}$
*	*	9-1	3 $\frac{1}{2}$
*	*	11-1	4 $\frac{1}{2}$
*	*	12-1	6 $\frac{1}{2}$
*	*	1-1-20	7 1/10 $\mu$
*	*	2-1	7 $\mu$
*	*	3-1	8 3/10 $\mu$
*	*	4-1	10 $\mu$
*	*	6-1	9 6/10
*	*	7-1	9 $\mu$
*	*	8-1	9 4/10 $\mu$
*	*	9-1	8 $\mu$
*	*	10-1	7 $\mu$

## FIVE YEARS ENDING

	DISTRIBUTION Men (Class A)	DISTRIBUTION Men (Class B)
--	----------------------------------	----------------------------------

1918

January	70.00	
February	75.00	
March	75.00	
April	75.00	
May	75.00	
June	75.00	
July	80.00	70.00
August	80.00	
September	80.00	
October	90.00	
November	90.00	
December	90.00	

1919

January	90.00	
February	90.00	
March	90.00	
April	90.00	
May	100.00	
June	100.00	
July	100.00	
August	115.00	
September	115.00	
October	115.00	
November	125.00	115.00
December	125.00	115.00

1920

January	125.00	115.00
February	125.00	125.00
March	125.00	
April	125.00	
May	125.00	
June	125.00	
July	125.00	
August	125.00	
September	125.00	
October	125.00	
November	145.00	
December		

The above shows salaried men and rate per month. For the last year the rate per hour as the monthly wage, and as a rule the same. At this time the stokers are putting in extra time at the day since early in 1917 and they have all been paid by one and one-half years the wage has been from 45¢ to 60¢ per

N MONTHS ENDING OCTOBER 31st, 1920.

RS	STOKERS (Class D)	STOKERS (Class E)	PIPE FITTER (Class A)	PIPE FITTER (Class B)	LABORERS Per Day	LABORERS Per hour
.00	65.00		65.00	60.00	.25	.35
.00	65.00		65.00	60.00	.25	.35
.00	65.00		65.00	60.00	.25	.35
.00	65.00		65.00	60.00	.25	.35
.00	65.00		65.00	60.00	.25	.35
.00	65.00		65.00	60.00	.25	.35
.00	65.00		65.00	60.00	.25	.35
.00	70.00	60.00	70.00		3.00	.25 .35 .40
.00	65.00		70.00		3.00	.30 .35
.00	70.00	65.00	70.00			.35
.00	70.00		70.00			.40
.00	70.00		70.00			.40
.00	75.00		70.00			.40
.00	80.00	75.00	75.00			.40
.00	80.00	75.00	80.00			.40 .45
.00	75.00		80.00			.30 .45
.00	80.00	75.00	85.00	80.00		.35 .40
.00	75.00		85.00	80.00		.40
.00	75.00		85.00	80.00		.40
.00	80.00		80.00	50.00		.40
.00	90.00	85.00	90.00	85.00		.40
.00	90.00		90.00		.40	.40
.00	90.00	85.00	90.00		.40	.40
.00	90.00	85.00	90.00		.40	.40
.00	90.00	85.00	90.00		.40	.40
.00	90.00	85.00	90.00		.40	.40
.00	90.00	85.00	90.00		.40	.40
.00	90.00	85.00	90.00		.40	.40
.00	90.00	85.00	90.00		.40	.40
.00	90.00	85.00	90.00		.40	.40
.00	100.00		90.00	.40		.40
.00	100.00		90.00	.40		.40
.00	100.00		100.00	.45		.40
.00	100.00		100.00	.45		.40
.00	105.00		100.00		.40	.45 .50
.00	105.00		100.00		.40	.45 .50
.00	105.00		110.00		.45	.50

considerable overtime at the plant, i.e. stokers, which is figured at .00 a month more for overtime, which should be added to their monthly the coal. As to day and hour wages - we have been unable to hire men by ment shows generally 40¢ per hour, it has differed and for the last



Sheet 16.

## St. Cloud Public Service Company.

## Gas Department.

*Statement Showing Gas Made, Gas Sold, and Gas Unaccounted for from January 1st, 1915, to August 31st, 1920.*

Period.	Gas made, cu. ft.	Gas sold, cu. ft.	Gas unaccounted for, cu. ft.	Per cent of make.
12 Months Ended Dec. 31, 1915.....	20,802,900	20,332,200	470,700	2.26%
12 " " 1916.....	21,605,957	21,302,500	303,457	1.40%
12 " " 1917.....	25,535,543	22,746,000	2,789,543	10.92%
12 " " 1918.....	31,368,000	22,788,700	8,579,300	27.35%
12 " " 1919.....	31,277,126	26,529,600	4,747,526	15.21%
8 " " Aug. 31, 1920.....	22,645,100	20,092,100	2,553,000	11.27%

**Note.—**I question the amount of gas unaccounted for and believe the percentages of loss shown here to be incorrect. The total coal gas assuming the meter to be correct, has always been metered, but the water gas has never been metered on account of meter not being large enough to properly register the gas made from the water gas set. For a part of 1917, all of 1918 and a part of 1919, the manager of the gas department did not prove to be a proper gas manufacturer and neither do we believe his records to be correct. All water gas made is estimated being based on the number of runs made per day which we consider is approximately correct, i. e. by filling a ten thousand cubic feet holder three times a day namely morning—noon—and night and the estimates of cubic feet made per run being taken on this basis.

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**EXHIBIT "F."**

## Sheet 17.

St. Cloud Public Service Co.  
Gas Department.

*Statement Showing Gas Meters in Service September 30th, 1907, to  
September 30th, 1920.*

Date.	Number of meters.
September 30, 1907.....	No record
September 30, 1908.....	No record
September 30, 1909.....	No record
September 30, 1910.....	512
September 30, 1911.....	579
September 30, 1912.....	651
September 30, 1913.....	715
September 30, 1914.....	778
September 30, 1915.....	825
September 30, 1916.....	No record
September 30, 1917.....	974
September 30, 1918.....	1001
September 30, 1919.....	1164
September 30, 1920.....	1265

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**EXHIBIT "R."**

## Sheet 18.

*Vital Statistics Showing the Population of St. Cloud, Minn., from  
Year 1900 to 1920.*

Year.	Population.	
	According to city directory.	According to Government census.
1900.....	8,663	.....
1904.....	10,490	.....
1906.....	11,345	.....
1910.....	11,873	10,600
1912.....	12,345	.....
1914.....	12,997	.....
1916.....	14,161	.....
1918.....	15,487	.....
1920.....	18,252	15,873

## EXHIBIT "S."

Sheet 19.

St. Cloud Public Service Company.

*Method of Proportioning General Expenses.*

General expenses such as rent, lighting and heating of offices, telephone service etc. are proportionally divided on the basis of operating expenses which would be as per the following approximate percentages:

Electric Department .....	60%
Street Railway .....	20%
Gas Department .....	20%
	100%

Expenses incident to the operation of the electric and Gas Departments only, such as meter reading and collecting etc. are divided on the same basis as before mentioned, the approximate percentages being as follows:

Electric Department .....	75%
Gas Department .....	25%
	100%

## EXHIBIT "T."

St. Cloud Public Service Company.  
Gas Department.

Sheet 20.

*Statement Showing Sundry Purchases of Gas Meters During the Years Ending December 31, 1917, 1918, 1919  
and 1920.*

Rate.	Invoice No.	Firm.	Quantity.	Rate.	Amount.	Fr.	Total.	Size.
2-20-20	4966-D	Sprague Meter Co.	25	10.10	252.50	10.15	262.65	A-1
2-20-20	4966-D	"	3	18.94	56.82	1.20	58.02	#-3
12-13-19	4850-D	"	6	10	9.60	4.73	100.73	A-1
12-13-19	4-51-D	"	3	17.94	53.82	5.91	59.73	#-3
10-15-19	4736-D	"	25	9.08	227.00	9.88	236.88	A-1
10-31-19	4774-D	"	15	9.58	143.70	5.60	149.30	A-1
9-6-19	4635-D	"	25	9.06	226.50	9.57	236.03	A-1
8-27-19	4600-D	"	4	16.30	65.20	2.75	68.95	#-3
7-10-19	4487-D	"	4	16.30	65.20	2.59	67.79	#-3
6-27-19	4430-D	"	25	9.06	226.50	16.05	242.55	A-1
6-5-19	4370-D	"	25	9.08	227.00	8.72	235.72	A-1
5-1-19	4285-D	"	10	9.12	91.20	3.92	95.12	A-1
5-11-18	3839-D	"	5	7.45	37.25	2.49	39.74	A-1
5-11-18	3839-D	"	4	13.39	53.56	5.39	58.95	#-3
9-26-18	B13005	"	3	15.80	94.80	2.90	97.70	#-3
May 1918	American	"	40	7.75	310.00	16.10	376.10	5 Lt.
May 1918	"	"	10	14.00	140.00	6.16	146.16	5 Lt.
2-8-18	B9724	Sprague	3	7.10	21.30	1.55	22.85	A-1
2-8-18	"	"	2	13.28	26.56	2.02	28.58	#-3
9-19-17	B8887	"	2	6.70	13.40	2.07	15.47	A-1
9-19-17	"	"	1	11.64	11.64	1.98	13.58	#-3
4-17-17	B7774	"	1	40.00	40.00	4.90	44.90	5-A

## St. Cloud Public Service Company.

## Statement of Sundry Cast Iron and Steel Pipe Purchases.

Date of Invoice.	Firm.	Description.	Amount.
April 27, 1918	American Cast Iron Pipe Co.	2960' 4" Cast Iron Pipe .....	\$2,034.63
June 20, 1919	American Cast Iron Pipe Co.	3600' 4" Cast Iron Pipe .....	2,337.23
April 13, 1920	A. Y. McDonald Manufg. Company	991' 3/4" Steel Pipe .....	72.38
April 29, 1920	A. Y. McDonald Manufg. Company	5040' 1 1/4" Steel Pipe .....	608.67
		5035' 3/4" " .....	334.35
		2628' 1 1/2" " .....	135.61
		1000' 3 1/8" " .....	39.04
		Freight and Handling .....	117.78
			1,295.65
May 7, 1920	A. Y. McDonald Manufg. Company	2160' 1" Black Steel Pipe .....	211.96
		967' 3/4" Galvanized .....	80.88
		Freight and Handling .....	29.28
			322.12
June 11, 1920	A. Y. McDonald Manufg. Company	2039' 2" Black Steel Pipe .....	434.45
		Freight and Handling .....	43.54
			478.99

## EXHIBIT "V."

## Sheet 22.

St. Cloud Public Service Company.

*Statement Showing Sales of First Mortgage Bonds.*

From August 1st, 1915, to August 31, 1920.

Date sold.	Amount of bonds sold.	Company selling price.
Aug. 1915.....	\$800,000.00	90
May 1916.....	39,200.00	90
Feb. 1917.....	76,900.00	91
Feb. 1917.....	115,900.00	91
Sept. 1917.....	110,000.00	90
Feb. 1918.....	75,000.00	85
March 1918.....	20,000.00	87
March 1918.....	1,600.00	95
May 1918.....	3,000.00	85
Oct. 1918.....	36,300.00	80
" 1918.....	1,000.00	85
" 1918.....	5,700.00	80
" 1918.....	3,000.00	80
Nov. 1918.....	20,000.00	85
Dec. 1918.....	10,000.00	90
May 1919.....	100,000.00	89
" 1919.....	4,900.00	89
Oct. 1919.....	177,500.00	88
Jan. 1920.....	122,000.00	88
May 1920.....	65,000.00	80
" 1920.....	23,200.00	90
	<hr/>	
	\$1,819,700.00	

## Sheet 23.

Information relative to the method of determining going value by the early loss method is given in detail in statements marked "Exhibit 'A' Sheets 1-A to 1-P" (Both inclusive).

St. Cloud, Minnesota,  
October 30, 1920.

St. Cloud Public Service Company,  
St. Cloud, Minnesota.

GENTLEMEN:

I am familiar with the valuations of City real estate in St. Cloud, and in my judgment a fair valuation of Lots Nine (9) and ten

(10) in Block Four (4) in Town of St. Cloud (Wilson Survey) is \$85,000, exclusive of the buildings and special side track. This ground is particularly well-located on the main line of the Great Northern Railway, and the St. Cloud Public Service Company owns its own side track accommodating the gas and electric light plant located upon said land.

This real estate is also only two blocks northerly on Fifth Avenue North from one of the best corners and business parts of our city, which is the corner of Fifth Avenue and St. Germain Street.

Yours very truly,

Note: We have original copies of this letter signed by C. P. Schwab, President of Farmers State Bank, H. A. McKenzie, Real Estate Dealer and President of Commercial Club.

219 Rebutting Affidavit of A. G. Whitney and foregoing Financial Statement and Statistics filed in U. S. District Court March 23, 1921.

220 United States District Court, District of Minnesota, Sixth Division.

ST. CLOUD PUBLIC SERVICE COMPANY, Plaintiff,

vs.

CITY OF ST. CLOUD, Defendant.

*Order Denying Motion for Preliminary Injunction.*

The above-entitled cause came regularly on for hearing upon a motion made by plaintiff for a preliminary injunction against the defendant, its Commission and officers, restraining them from in any manner interfering with the plaintiff in raising the rate to be charged for fuel gas in the City of St. Cloud to the sum of three dollars and thirty-nine cents (\$3.39) per thousand cubic feet, or from instituting any suit against plaintiff to interfere with plaintiff in putting into effect said rate, or from attempting to force plaintiff to sell fuel gas at the rate prescribed in the ordinance set forth in the complaint. Said motion was made upon the pleadings and files.

J. D. Sullivan, Esq., Pierce Butler, Esq., and Messrs. Cobb, Wheelwright & Benson appeared in support of said motion; and Ripley B. Brower, Esq., in opposition thereto.

And the Court having heard the arguments of counsel, and duly considered the same, together with all the files and records in said cause, hereby

Orders, that said motion be, and the same is hereby, in all things denied.

WILBUR S. BOOTH,  
Judge.

221 United States District Court, District of Minnesota, Sixth Division.

ST. CLOUD PUBLIC SERVICE COMPANY, Plaintiff,  
vs.

CITY OF ST. CLOUD, Defendant.

*Order Granting Motion to Dismiss Bill of Complaint.*

The above-entitled cause came regularly on for hearing upon a motion by the defendant to dismiss the bill of complaint, on the following grounds:

1. That it conclusively appears that the plaintiff is furnishing gas service to the defendant and its inhabitants in compliance with the terms of a contractual ordinance limiting the maximum cost of fuel gas to the sum of One and 35/100 dollars (\$1.35) per thousand cubic feet of gas, and that plaintiff is bound by said contractual ordinance.

2. For want of equity in said action.

3. That no Federal question is involved in said action.

4. That the Court has no jurisdiction in said cause.

Ripley B. Brower, Esq., appeared in support of said motion; and J. D. Sullivan, Esq., Pierce Butler, Esq., and

Messrs. Cobb, Wheelwright and Benson in opposition thereto.

Said motion was made upon the pleadings and all the files and records in said cause.

The Court having heard the arguments of counsel, and duly considered the same, together with all the files and records in said cause, hereby

222 Orders, that said motion to dismiss be, and the same is hereby granted, and the bill of complaint is hereby dismissed for want of equity.

WILBUR S. BOOTH,  
*Judge.*

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*Memorandum.*

Plaintiff is a corporation of the State of Minnesota, owning and operating electric and gas plants furnishing electricity and gas to the defendant City of St. Cloud and its inhabitants. The defendant is a municipal corporation of the State of Minnesota, and a city of the fourth class. From 1868 to November 28, 1911, it existed and operated under special charter; since November 28, 1911 under a home rule charter. The present suit is brought by the company to enjoin the city and its officers from in any manner interfering with the plaintiff company in raising the rate to be charged for fuel gas

furnished in the city of St. Cloud from the present rate of \$1.35 per thousand cu. ft. to \$3.39 per thousand cu. ft., or from attempting to force plaintiff to continue to sell its gas at the present rate; and to have the present rate adjudged non-compensatory and confiscatory of plaintiff's property. Jurisdiction of the court is invoked on the ground that the present rate for gas fixed by an ordinance of said city is inadequate and confiscatory, and that the enforcement of the same will deprive plaintiff of its property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States, and that unless the defendant is enjoined from so doing, it will attempt to force plaintiff to sell its gas at the rate fixed by said ordinance, and that such action will deprive plaintiff of its property without due process of law, in violation of said Fourteenth Amendment to the Constitution of the United States.

The present hearing is upon a motion by plaintiff for a temporary injunction, also upon a motion by the defendant city to dismiss the suit for want of jurisdiction and for lack of equity.

It appears from the pleadings and affidavits introduced at the hearing that in 1905 an ordinance was prepared and submitted to the Common Council of said city by The Public Service Company of St. Cloud, Minnesota, granting to the company the right to furnish electricity and gas to the city and its inhabitants. Said ordinance

224 was duly passed, and on the 19th of December, 1905, duly approved, and was known as Ordinance No. 160. It reads as follows:

#### "Ordinance No. 160.

An ordinance granting the right to acquire, construct, maintain and operate works for the production, manufacture and sale of electricity and for the manufacture and sale of gas in the City of St. Cloud, Minn.

The common council of the City of St. Cloud do ordain:

Section 1. That the right and privilege is hereby granted to the Public Service Company of St. Cloud, Minnesota, to acquire, construct, maintain and operate in the City of St. Cloud, Minnesota, works and instrumentalities for the production, manufacture, distribution and sale of electricity for illuminating, power, fuel and other purposes, and for the manufacture, distribution and sale of gas for illuminating power, fuel and other purposes and for that purpose to erect and maintain in all the streets, avenues, alleys and public places of the City of St. Cloud such poles, wires and cables as may be necessary for the purpose of the manufacture, distribution and sale of electricity, and to lay down in any of the streets, avenues, alleys and public places in the said City of St. Cloud such mains and service connections as may be necessary in the distribution and sale of gas for the purposes aforesaid.

The rights, privileges and franchises hereby granted shall expire on the first day of December, A. D. 1935.

Section 2. The grantee named in section one of this ordinance is hereby authorized to produce, manufacture and vend electricity for lighting, fuel, power and other purposes and to manufacture and vend gas for light, fuel and other purposes to the City of St. Cloud and the inhabitants thereof for and during the period aforesaid.

Section 3. That the said grants shall vest in said grantee full power and license to make all necessary erections and excavations necessary for the purposes aforesaid under the direction of the city engineer, but the same shall be done with due and reasonable dispatch and diligence and with the least practicable inconvenience to or interference with the rights of the public and individuals, and the said grantee shall restore all streets, alleys, sidewalks and public places where excavated by it to their original condition as far as practicable, and all damages done by such excavation shall be repaired by such grantee, and in case any obstructions caused by such excavation shall remain longer than twenty-four hours after notice to remove the same, or in case of neglect on the part of said grantee to protect any dangerous places by proper guards, then the said city may remove or protect the same at the cost of said grantee.

Section 4. That in laying down pipes or erecting wires, said grantee shall conform to all reasonable regulations prescribed by said city to prevent unnecessary injury to the streets, alleys, sidewalks and public places, and shall not interfere with or injure any water pipes, drains or sewers of said city.

Section 5. In consideration of the rights and privileges herein granted, the grantee hereby covenants and agrees that it will prior to the first day of January, A. D. 1907, erect or cause to be erected in the City of St. Cloud an efficient coal gas generating plant or system of ample capacity, and after the erection thereof will manufacture and offer for sale to the city and its inhabitants coal gas of at least fourteen candle power, and in the meantime will furnish gas from the present gas works of the grantee of the standard now manufactured therein.

Section 6. The grantee is authorized hereby to sell illuminating gas when the works therefor shall have been completed, of a standard of fourteen candle power at the price of not to exceed one dollar and 85-100 (\$1.85) per thousand cubic feet, and fuel gas at the rate of not to exceed one and 35-100 — (\$1.35) per thousand cubic feet, and the grantee shall be at liberty to cut off the supply from any person failing or refusing to pay for gas furnished for a period of thirty days."

Section 7 provides for an appraisal, and option for purchase by the city.

226 "Section 8. Wherever the grantee is named or understood in this ordinance it shall be taken to mean and include The Public Service Company of St. Cloud, Minn., its successors and assigns.

Section 9. This ordinance shall take effect and be in force from and after its publication."

Pursuant to said ordinance the grantee occupied the streets of the city, with its poles for electric wires, and pipes for furnishing gas; and furnished electricity and gas until the 17th of August, 1915, when it sold and conveyed all of its property in the said city, including its electric plant and gas plant, to plaintiff, including "all of the rights, powers, privileges, and benefits inuring or accruing by or through the following ordinances, viz.

(a) Ordinance Number 160 of the City of St. Cloud, Stearns County, Minnesota, approved December 19, 1905, granting to The Public Service Company of St. Cloud, Minn., and its assigns certain rights relating to the maintenance and operation of electric and gas works in said City of St. Cloud. \* \* \* \* Also.

(4) All the rights, privileges, immunities and licenses of The Public Service Company of St. Cloud, Minn., over, in, upon, along, under, through or across the road, streets, alleys, bridges, streams or waters and public places of the City of St. Cloud, and vicinity, and all rents, issues, tolls, incomes and profits of the said Company arising from its said business or property and all the good-will of its business, and all of its contracts with said City or with other corporations, or persons, and all rights and equities accrued or to accrue thereunder."

Since the said purchase, plaintiff company, composed largely of the same stockholders as the old company, and having largely the same executive officers, has furnished gas and electricity to defendant city and its inhabitants in accordance with the terms of said ordinance.

The price of gas for fuel purposes charged by plaintiff's predecessor and by plaintiff has been at all times \$1.35 per thousand cu. ft., the full maximum rate provided for by said ordinance, with a 10 cent per thousand cu. ft. discount for prompt payment during a portion of said period. Since November 1, 1919, the rate has been \$1.35 flat per thousand cu. ft. No gas for illuminating purposes has been manufactured or sold under said ordinance, either by the original grantee or by the present plaintiff.

On April 25, 1919, the legislature of the State of Minnesota passed a law, known as Chapter 469 Laws 1919, entitled,

"An act to empower any cities of the third and fourth classes in the state of Minnesota, whether existing under a special or general law, or under a home rule charter, to prescribe reasonable rates under which public service corporations supplying gas or current for electric lighting or power purposes and occupying the streets and public places of any such city may operate within any such city."

Section 1 reads as follows:

"Section 1. Rates for gas or electric current to be prescribed by city council.—That in addition to all other powers now conferred

upon any cities of the third and fourth classes in the state of Minnesota, whether existing under a general or special law or under a home rule charter, any such city is hereby authorized and empowered, through its city council or like governing body, by ordinance, to prescribe from time to time the rates which any public service corporation supplying gas or electric current for lighting or power purposes within said city may charge for such service. Provided, that nothing herein shall be construed to impair the obligation of any contract or franchise provision now existing between any such city and any such public service corporation. \* \* \*

Section 2 read as follows:

"Sec. 2. Hearing ordered.—Such rates shall be prescribed only after hearing and twenty days' notice of the time and place of such hearing shall have been given to such public service corporation, which notice shall be served in the manner prescribed by law for the service of summons in district court. Such proceedings may be instituted by the council or other governing body of said city or upon petition of any such public service corporation, or upon petition of twenty-five per cent of the customers served by such corporation within such city, and failure on the part of such council or other governing body to make a determination as to such rates within sixty days after such petition is filed with the clerk of said city shall be deemed a denial of such petition and a determination adverse to such petitioners. \* \* \*

Section 3 provides for an appeal to the State District Court.

Acting pursuant to said statute plaintiff company, on the 31st of August, 1920, presented to the proper officers of defendant city a petition asking that the city investigate the question of cost of producing and supplying gas to the inhabitants of St. Cloud, and that after such investigation said city prescribe such a rate as should permit the company to make a reasonable return upon the capital invested in its business of producing gas. The application 228 was denied, on the 28th of September, 1920, upon the ground that said city had no jurisdiction to entertain such a petition. Thereafter the present suit was brought.

It is claimed by the defendant city that Ordinance 160 constitutes a contract between it and the company, still in existence, and of binding force; that the company's predecessor, having entered into the contract and accepted the same, was estopped to claim that the contract was not binding, or to claim that the rate provided in the contract was confiscatory, and that the estoppel is binding on the plaintiff company, which purchased of the former company the property and the rights under the ordinance. It is claimed, further, by the city that there is no real substantial federal question set up in the complaint, and that therefore the court has no jurisdiction to entertain the suit; and, further, that the charter of the defendant city contains a provision which was in full force and effect at and prior to the time of the passage of Ordinance No. 160, and which reads as follows:

"Sec. 17. The place of trial of all actions or proceedings by or against the City of St. Cloud not brought before a city justice shall be in the county of Stearns. All suits or proceedings by or against said city, not brought before a city justice, shall be brought in the District Court of said Stearns County; and no other court whatever shall have original jurisdiction thereof. Provided, that this section shall not prevent the bringing of any proceeding in the Supreme Court of the state in which said Supreme Court may have original jurisdiction."

Defendant contends that by virtue of this provision of its charter the present suit cannot be maintained in this court, for want of jurisdiction.

Plaintiff contends that there is no contract between the city and the company covering rates to be charged for gas; first, because the city had no power to make such a contract; second, because no contract was in fact made as to rates to be charged for gas by the passage and acceptance of said Ordinance No. 160.

Plaintiff further contends that the maximum rate for fuel gas mentioned in said ordinance is now, always has been, and will continue to be during the life of said ordinance, unreasonably low, and if enforced, confiscatory of plaintiff's property; that the refusal of

the city to enter upon an investigation as prayed for in the  
229 petition of May 1920 and to prescribe new rates for gas, and  
the threats to continue in force the present rate, amount to  
depriving plaintiff of its property without due process of law, in  
violation of the Fourteenth Amendment to the Constitution of the  
United States.

As to the jurisdiction: Whether a case is stated as arising under the Constitution or laws of the United States must be determined from the bill of complaint itself.

Taylor v. Anderson, 234 U. S. 74.

Upon consideration of the allegations contained in the present complaint, I am of opinion that questions are presented by the complaint which arise under the Fourteenth Amendment to the Federal Constitution and that those questions are not so wholly lacking in merit as to afford no basis for jurisdiction.

Columbus Ry. &c. Co. v. Columbus, 249 U. S. 399;  
Hillsdale Gas Co. v. Hillsdale, 258 Fed. 485;  
Mich. Ry. Co. v. Lansing, 260 Fed. 322.

As to the contention that by the charter provisions of the city it can be sued only in the local state courts, it is sufficient to say that the jurisdiction of the Federal Courts cannot be abridged or limited by such state statutes.

Harrison v. R. R., 232 U. S. 318;  
Mercer County v. Cowles, 7 Wall. 118;  
Home Ins. Co. v. Morse, 26 Wall. 445;  
Barrow Steamship Co. v. Kane, 170 U. S. 100;  
Fidelity Co. v. Gill Co., 25 Fed. 737.

Passing to the merits. Two main questions arise: First, Did the city at the time of the passage of Ordinance No. 160 have power to make a contract as to rates for gas? Second, Was a contract in fact made between the city and the company as to rates for gas, by the passage and acceptance of Ordinance No. 160?

These questions will be taken up in reverse order.

Assuming, for the present, authority on the part of the city, did the city, by passing the ordinance No. 160, and the company, by accepting it, enter into a contract, so far as a maximum rate for gas was concerned, as provided in section 6 of said ordinance?

If the ordinance be considered as a whole, the conclusion must be that it is a contract. It grants a franchise to occupy the streets with electric poles and gas mains and to manufacture and sell

230 electricity and gas to the city and its inhabitants. Such a franchise is a contract. This would probably be conceded by the plaintiff. But plaintiff claims that the ordinance is not to be considered as a whole for the purpose of the present inquiry; that though parts of it constitute a contract, yet a part of it simply constitutes a regulation made by the city in the exercise of its legislative power. Such is the provision, plaintiff claims, as to the maximum rate to be charged for gas set out in section 6 of the ordinance. This appears to be equivalent to saying that the rate provision, though included in the contract, is no part thereof. It is certainly germane to the subject matter and of vital importance. The questions arise why was the rate provision inserted in the contract? Why was section 6 not enacted as a separate ordinance, instead of being placed in and as a part of a contractual franchise? The natural answer would seem to be that the city assumed at least to make section 6 and the provisions thereof a part of the contract.

It is claimed, however, by plaintiff that the language used in section 6 is not contractual in form. No particular form of language is indispensable, if the intention of the parties can be ascertained therefrom. Section 1 of the ordinance uses the language: "The right and privilege is hereby granted." Section 2: "The grantee is hereby authorized to manufacture and vend gas," etc. Section 3: "The said grants shall vest in said grantee full power and license." Section 4: "In laying down pipes or electric wires, said grantee shall conform to all reasonable regulations," etc. Section 5: "In consideration of the rights and privileges herein granted, the grantee hereby covenants and agrees." Section 6: "The grantee is authorized hereby to sell illuminating gas when the works therefor shall have been completed, of a standard of fourteen candle-power at the price of not to exceed \$1.85 per thousand cubic feet, and fuel gas at the rate of not to exceed \$1.35 per thousand cubic feet." Section 7: "The rights hereby granted are upon the express condition that the city of St. Cloud may purchase,". It will thus be seen

231 that the language varies in nearly every section of the ordinance. It is pointed out by plaintiff that the language of section 6 differs from that of section 5, and also from that of section 7, which later sections are conceded by plaintiff to be contractual. But the language of section 6 is practically identical

with the language of section 2, and it will hardly be claimed that section 2 is not contractual.

Furthermore, the language of section 6 is much more nearly contractual in form than it is legislative. The ordinary form for the latter would be, "The price to be charged for fuel gas is fixed at." By section 6 the price is left to the judgment of the company, except that it may not exceed the maximum. There was reason for this elasticity, for it might well happen that a price below the maximum would prove more profitable to the company than the maximum price; and this could be determined only by experience.

Furthermore, language similar to that used in section 6 of the ordinance has frequently been held to be sufficient to create a contract.

In the Knoxville case, 261 Fed. 283, the language of the ordinance was "said gas company shall at all times furnish \* \* \* gas of not less than 15 candle power, and shall never charge for the same more than \$1.10 per thousand cu. ft., &c. Held that the language was sufficient to create a contract. Held further, the city had not the power to make the contract.

In the San Antonio case, 257 Fed. 467, the ordinance read "Said street-car company shall charge five cents fare for one continuous ride," &c. Held sufficient to create a contract. Held further, City had not the power to make such contract.

In the Detroit case, 184 U. S. 368, the ordinance read, "The rate of fare for any distance shall not exceed five cents in any one car," &c.

Held sufficient to create a contract.

In the Vicksburg case, 206 U. S. 496, the ordinance read " \* \* \* shall have the right \* \* \* to make such rates and charges as they may determine, provided that such rates and charges shall not exceed 50¢ for each thousand gallons of water."

232 Held sufficient to create a contract.

In the Cleveland v. City Railway case, 194 U. S. 517, the ordinance read "Said company shall not charge more than 5 cents fare each way for one passenger," &c.

Held sufficient to create a contract.

In Cleveland v. Electric Railway, 201 U. S. 529, the ordinance read, "and that for a single fare \* \* \* no greater charge than 5 cents shall be collected."

Held sufficient to create a contract.

In the Muncie case, 60 L. R. A., 822, (Ind.) the ordinance read, "Provided that in no case shall the total cost to such consumers for private purposes of such gas at any time exceed \* \* \*."

Held sufficient to create a contract.

It was held further in the Muncie case that a provision of statute relating to municipal corporations and reading, "The common council shall have exclusive power over the streets, highways, alleys and bridges within said city" was sufficient to give to the city power to enter into the contract providing for maximum rates for gas.

In view of the fact that section 6 is included in a franchise ordinance, concededly contractual in its nature, and that the language of section 6 is sufficient to create a contract, and that similar lan-

guage in ordinances has been held to be contractual, I conclude that section 6 was intended to be and is contractual.

Did the city at the time of the passage of Ordinance No. 160 have power to make a contract as to rates for gas?

The charter of the defendant city was originally contained in a special act of the legislature of Minnesota, approved March 8, 1862, and an act approved March 6, 1868, and acts amendatory thereto. These acts were consolidated by an act approved April 13, 1889, Special Laws 1889, chapter 6. This act is entitled, "An act to consolidate in one act the charter of the City of St. Cloud and to amend the same." The act is divided into chapters, Section 1, chapter 1,

of the act provides that the city "shall be a municipal corporation, by the name of the 'City of Saint Cloud'; \* \* \*

shall be capable of contracting and being contracted with; and shall have all the powers possessed by municipal corporations at common law, and in addition thereto shall possess all powers hereinafter granted. \* \* \*"

Section 4 of chapter 4 of the act provides:

"Sec. 4. The common council in addition to all powers herein contained and specifically mentioned, shall have full power and authority to make, enact, ordain, establish, publish, enforce, alter, modify and repeal and amend all such ordinances, by-laws, rules and regulations, for the government and good order of the city, for the suppression of vice and intemperance; for the prevention of crime, and for the general welfare of the city and the inhabitants thereof, as they shall deem expedient. \* \* \*"

Section 5 of chapter 4 of the act provides:

"The common council shall have full power by ordinance:

10th. \* \* \* To provide for and control the erection and operation of gas works, electric lights, or other works or material for lighting the streets and alleys, public grounds, and buildings of said city, and supplying light and power to said city and its inhabitants; and to grant the right to erect, maintain and operate such works, with all rights incident or pertaining thereto, to one or more private companies or corporation, and to control the erection and operation of such works and laying of pipes, mains, and wires into, through and under the streets, avenues, alleys and public grounds of said city, and the erection of poles and mainstays, and the stringing of wires thereon, over, in, upon, and across the streets, alleys and public grounds; to provide for and control the erection and operation of works for heating the public buildings of said city by steam, gas, or other means, and supplying light, heat, and power to the inhabitants of said city; to grant the right to erect such works and all incident rights to one or more private companies or corporations, and to control and regulate the erection and operation of such works, and the laying of mains into, through, and under the streets, alleys, and public grounds of said city; provided, that every grant to a company or

corporation of the right to erect or maintain any of said works shall provide that the city or its successors may purchase the same at such time and in such manner as shall be prescribed in the grant; and provided further, that the common council shall have authority to regulate and prescribe the fees and rates and charges of any and all companies hereinbefore mentioned."

Subdivision 34 of section 5, chapter 4, of the act:

"34th. To regulate and control the quality and measurement of gas. To prescribe and enforce rules and regulations for the manufacture and sale of gas, the location and construction of gas works, and the laying, maintaining and repairing of gas pipes, mains and fixtures, to provide for the inspection of gas and gas meters, and to appoint an inspector if needed and to prescribe his duties."

Section 7, chapter 14, of the act provides:

"Sec. 7. No law of the state concerning the provisions of this act, shall be considered as repealing, amending, or modifying the same, unless said purpose be expressly set forth in such law."

It is clear from the foregoing provisions of its charter that the city had the following powers expressly granted:

- 234      1. To erect and operate gas or electric works of its own to supply light and power to the city and its inhabitants;
2. To grant the right to one or more private companies to do these things, and to control the erection and operation by said grantee;
3. To erect and operate works of its own for heating by steam, gas, or other means, to supply heat and power to the city and its inhabitants;
4. To grant the right to one or more private companies to do these things and to control and regulate the erection and operation by said grantee;
5. To purchase from any company such works erected and operated by it;
6. To regulate and prescribe the fees, rates and charges of all such companies;
7. To regulate and control the quality and measurement of gas;
8. To prescribe and enforce rules and regulations relative to location of gas works and regulation relative to location of gas works and their construction; relative to laying, maintaining and repairing of pipes; relative to the manufacture and sale of gas; and to provide for inspection of gas and gas meters.

The general rule is well established that power in a municipal corporation to make a rate contract which shall be inviolable by either

party will be held to be granted by the legislature only when the language of the statute is clear, unambiguous, and free from doubt.

- Home Tel. Co. v. Los Angeles, 211 U. S. 265;
- Columbus Ry. &c. Co. v. City, 249 U. S. 399;
- Knoxville Gas Co. v. City, 261 Fed. 283;
- San Antonio Pub. Ser. Com. v. City, 257 Fed. 467;
- Town of Williams v. Iowa Falls Co., 170 N. W. 815;
- Freeport v. City, 180 U. S. 587;
- Rogers Park Water Co. v. Fergus, 180 U. S. 624;
- Wyandotte Co. Gas Co. v. Kansas, 231 U. S. 622;
- Woodburn v. Pub. Ser. Com., 161 Pac. 391; (L. R. A. 1917C, 98).

In Minnesota the same general rule prevails.

- Nash v. Lowry, 37 Minn. 261;
- State ex-rel. City of St. Paul v. Minn. Transfer Ry Co., 80 Minn. 108;
- Long v. City of Duluth, 49 Minn. 280.

235 But the cases are numerous in which rate contracts have been held to be valid and inviolable where the language of the statute authorized the city to make such a contract, or where the legislature had thereafter expressly ratified it.

- Minneapolis v. Mpls. St. Ry., 215 U. S. 417;
- Detroit v. Detroit Ry. Co., 184 U. S. 368, 382;
- Vicksburg v. Water Co., 206 U. S. 496, 508;
- Los Angeles v. Water Co., 177 U. S. 558;
- Cleveland v. City Ry. Co., 194 U. S. 517;
- Cleveland v. Elec. Ry. Co., 201 U. S. 529;
- Cincinnati v. P. U. Com., 98 O. St. 320 (3 A. L. R. 705);
- Columbus Ry. Co. v. City, 249 U. S. 399;
- Mich. Ry. Co. v. City of Lansing, 260 Fed. 322;
- Hillsdale Co. v. City, 258 Fed. 485.

There are also numerous cases which hold that rate contracts embodied in franchise ordinances made by a city with a public utility company, though the city had no express authority to make an inviolable rate contract, are nevertheless binding on the parties until abrogated or altered by the legislature directly or through a duly authorized commission. Such contracts are often called "permissive" contracts.

- Traverse City v. Ry. Com., 168 N. W. 481;
- Manitowoc v. Company, 145 Wis. 13 (129 N. W. 925); cited with approval in
- Milwaukee Ry. v. Wis. R. R. Com., 238 U. S. 174;
- Lenawee Co. Gas Co. v. City, 176 N. W. 590 (Mich.);
- Boerth v. Gas Co., 18 L. N. S. 1197; 152 Mich. 654;
- Indpls. v. Gas Co., 27 L. R. A. 514;
- Omaha Co. v. City, 147 Fed. 1;
- Muncie Co. v. Muncie, 160 Ind. 97; 60 L. R. A. 822;
- Benwood v. P. S. Com., 55 L. N. S. 261;

St. ex rel. Webster v. Sup. Ct., 67 Wash. 371; 55 L. N. S. 237;  
Puget Sound Co. v. Reynolds, 244 U. S. 574;  
Woodburn v. Pub. Ser. Com. (Ore.), 161 Pac. 391, (L. R. A.  
1917C, 98);  
See also Worcester v. Ry. Co., 196 U. S. 539, 552.

Such permissive contracts have been recognized in Minnesota.  
City of Red Wing v. Wis.-Minn. L. & P. Co., 139 Minn. 240  
166 N. W. 175).

In that case the city had no express power either to make a rate contract or to grant a franchise or to prescribe rates, yet it had granted a franchise by ordinance, and provided therein a method of fixing rates by arbitration. In its opinion the court said:

"The rights of the litigants are based solely upon the contract evidenced by the ordinance, and not upon any rate-making power delegated to the city. It is not questioned and could not well be, that in a franchise ordinance rates and the manner of fixing them, both for the city and its inhabitants, could be provided for, subject to the right of subsequent legislative interference."

236 And further,—

"There is no limitation of lack of authority in the city council to grant the franchise here involved. It is manifest that in granting it the same benefits and privileges were intended to be secured not only to the municipality itself, but to its inhabitants as well, that is to those who in the future might desire to use gas. Hence naturally we look for provisions in the franchise guarding or protecting all consumers against an arbitrary fixing of gas prices by defendant."

Again,—

"The city of Red Wing represented not only the municipality but its several inhabitants in making this franchise contract. And in bringing this action to enforce that contract as to a provision thereof which defendant repudiates, while holding on to the others, the city acts not only as a municipality but as a sort of trustee for its inhabitants."

Construction of legislative enactments by the highest court of the state where they are passed is conclusive in the Federal Courts; and adjudication as to the status and validity of franchise ordinance contracts by the highest court in the state where they are made, if not conclusive in the Federal courts, is nevertheless entitled to great weight.

Ill. Trust & Savings Bank v. City of Arkansas City, 76 Fed.  
271, 279;  
Puget Sound v. Reynolds, 244 U. S. 574;  
Mil. Ry. v. Wis. R. R. Com., 238 U. S. 174;  
Knoxville Gas Co. v. City, 261 Fed. 283;

Mitchell v. Dak. Cent. Tel. Co., 246 U. S. 396, 411;  
Vicksburg v. Water Co., 206 U. S. 496;  
Cleveland v. City Ry., 194 U. S. 517;  
Columbus Ry. Co. v. City, 249 U. S. 399.

Let us examine the statutes of the State of Minnesota and the decisions of its Supreme Court, and of the Federal Court sitting in the state, to see whether they throw any light upon the questions presented in the case at bar.

Plaintiff contends that the policy of the State of Minnesota is against allowing municipal corporations to enter into contracts covering rates to be charged by public service corporations for a period of time, and cites in support of the State policy section 6137 of the General Statutes of Minnesota, 1913. That section reads as follows:

"The state shall at all times have the right to supervise and regulate the business methods and management of any such corporation, and from time to time to fix the compensation which it may charge or receive for its services; and every such corporation obtaining a franchise from a city or village shall be subject to such conditions and restrictions as from time to time may be imposed upon it by such municipality."

But the policy of the State of Minnesota is to be found not alone in section 6137, but also in the liberal special charters granted 237 by the state to various municipal corporations from time to time; also in an amendment to the Constitution of the State of Minnesota adopted November 3, 1896, amended November 8, 1898, and now section 36 of article 4 of the constitution, providing for the adoption of home rule charters by cities and villages; also by section 1345 of the General Statutes of Minnesota, 1913, passed subsequent to the constitutional amendment above referred to, and providing what might be included in said home rule charters. Section 1345 reads in part as follows:

"It (proposed charter) may provide for any scheme of municipal government not inconsistent with the Constitution, and may provide for the establishment and administration of all departments of city government and for the regulation of all local municipal functions as fully as the legislature might have done before the adoption of section 33, article 4 of the constitution."

Section 33, article 4, referred to was an amendment prohibiting special legislation, where a general law could be made applicable. The constitutional amendment providing for home rule charters "fairly implies that the charter adopted by the citizens of a city may embrace all appropriate subjects of municipal legislation, and constitute an effective municipal code, of equal force as a charter granted by a direct act of the legislature." Grant v. Berrisford, 94 Minn. 45. It was in view of such legislation that the city of Moorhead adopted its home rule charter, and provided therein that every ordinance granting a franchise should contain all the terms and conditions of

the franchise, and that the maximum price of the service should be stated in the grant. And it was in view of the spirit of such legislation that it was held that a gas company which had contracted to furnish gas to a city and its inhabitants for a term of years at fixed rates could not be given the right by a court of equity to violate its contract and increase its rates because war conditions had rendered them unprofitable. *City of Moorhead v. Union Light & Power Co.*, 225 Fed. 920.

The public policy of the state is also to be found in the decisions of the courts construing such special charters granted by the legislature.

In the case of *Fergus Falls Water Co. v. City of Fergus Falls*, 65 Fed. 586, the city had granted an exclusive franchise for the period of thirty years to lay water mains in the city and furnish the city with water, and the city contracted that it would pay rental 238 for fifty hydrants, at the rate of \$80 each per annum. After some years the city passed a resolution attempting to cancel the franchise ordinance, and the company brought an action to recover rentals accrued and unpaid. The charter of the city provided amongst other things that the city council should have power "to contract with any person, persons, or corporation for the lighting of such streets or parts of streets and public places as the city shall deem proper for the convenience and safety of the inhabitants, and also for supplying the city with water." It was claimed, however, that the city had no authority to contract for an exclusive franchise, nor for a period of the length mentioned. The court in its opinion said:

"It is evident that the passage of the first ordinance, of August 30th, 1893, was brought about by the fact that instead of growing, as was expected, the city had decreased in population and assessable valuation. The law does not favor the idea that a man shall abide by a contract when it is advantageous to him, and repudiate it when it becomes irksome. It is well settled that time and even exclusive contracts may be made by city authorities for the purpose of inducing persons to embark capital in such enterprises as water or gas works, and common sense and experience teach us that without such provisions capital would not be invested. The only question is, is this ordinance so unreasonable, so oppressive, so contrary to public policy that the law will interfere and declare it void? I am of the opinion that, if this question had been raised at the outset, it is doubtful whether the city council had authority to give an exclusive contract of this character to any person for the purpose stated; but as plaintiff's assignor, relying upon the ordinance, in good faith invested a large sum of money in these works, and the city has for ten years enjoyed the benefits thereof without objection or complaint, and has now the opportunity of purchasing the works at a reasonable valuation, commensurate with the productive value thereof, I do not consider that the ordinance is so unreasonable, oppressive, or contrary to public policy as to be void. Where a contract is sought to be avoided on the grounds above stated, it must be treated as a nullity by the parties seeking to avoid it, and must be repudiated in toto. He can not repudiate it and at

the same time reap any of the benefits derived from it, as the defendant has attempted to do."

In the case of *Flynn v. Little Falls Electric & Water Co.*, 71 Minn. 180, where it was held that the city was incorporated under the provisions of the laws of 1885, chapter 145, which gave to villages the power "to establish a fire department, to appoint the officers and members thereof, and prescribe and regulate their duties, to provide protection from fire by the purchase of fire engines and all necessary apparatus for the extinguishment of fires, and

by the erection or construction of pumps, water mains, reservoirs or other water works", it was held that the city had

power to enter into a time contract with the water company to pay an agreed price for a specified number of hydrants to supply water for fire protection, but it was held that the term of years, (30), was unreasonable, in view of all the circumstances, and therefore the contract was invalid. The court in its opinion said:

"The vice, if any, in this ordinance, viewed as a contract, consists mainly, if not entirely, in the length of time for which it bound the city to pay annually this sum of \$4,000 for fire hydrants."

"In the case of *Anoka Water Works &c. Co. v. The City of Anoka*, 109 Fed. 580, it appeared that the City of Anoka had by ordinance granted to certain parties certain franchises, one for the construction and maintenance of water works, and the other for an electric plant. The term of the franchises was thirty-one years. In the ordinance the city agreed to pay certain rates and rentals; and in one of the ordinances maximum prices were fixed for private consumers. Later the city passed a series of five ordinances, purporting to repeal the two ordinances above mentioned. The company brought suit to enjoin the city. The powers of the city are found in its charter, chapter 9, Special Laws of Minnesota, 1889.

Chapter 1, section 1, reads in part as follows: The city of Anoka "shall have the powers generally possessed by municipal corporations at common law, and in addition thereto shall possess the powers hereinafter specifically granted, and be capable of contracting and being contracted with; \* \* \*"

Chapter 4, section 3, of said charter reads as follows:

"Sec. 3. In addition to any other powers herein granted, said city council shall have full and complete power and is hereby invested with the authority to make, enact, ordain, establish, publish, alter, modify, amend, repeal and enforce all such ordinances, rules, regulations, by-laws, orders and resolutions for the government and good order of the city for the suppression and punishment of vice and intemperance; for the prevention and punishment of crime therein and for the protection of life and property, and the safety and health of the inhabitants of said city, as they shall deem expedient."

Section 5, chapter 4, reads as follows:

"The city council of the city of Anoka are hereby expressly authorized and empowered to enact and enforce ordinances, by-laws, orders or resolutions in the following cases and for the following purposes:

\* \* \* \* \*

"Twelfth—To make and establish public pumps, wells, cisterns, hydrants and reservoirs, and to provide for and conduct water into and through the streets, lanes, alleys and public grounds of said city and to provide for and control the erection of water works for the supply of water for said city and its inhabitants; \* \* \*

\* \* \* \* \*

"Fifteenth—To erect lamps or to provide for the lighting of said city by electricity, gas or other means; to control the erection of any works for the lighting of said city, its streets, public buildings or public grounds; to create, alter and extend lamp or light districts; to provide for heating the public buildings of said city, and by a two-thirds ( $\frac{2}{3}$ ) vote of the council to permit private persons or corporations to lay pipes in the streets for furnishing heat or motive power."

\* \* \* \* \*

"Forty-eighth—To grant to any corporation, corporations, person or persons the right to use and occupy the streets, alleys and public grounds of said city, for the purpose of maintaining and operating any railroad, telegraph, telephone, electric light or street car line, and to provide the manner in which such right shall be exercised and prevent any violation of any ordinance or regulation in relation to the same, and enforce punishments against any person or persons violating such ordinance or regulation."

The ordinances in question read in part as follows:

Ordinance No. 73.

"Section 1. That Edmund T. Sykes, Edward D. Brown and J. A. Chase, of the City of Minneapolis, Minnesota, their legal representatives or assigns be, and they are, under the conditions, resolutions, covenants and agreements hereinafter contained, but subject to the right of purchase as provided in ordinance number seventy-five of said city, and of the forfeitures hereinafter provided, hereby authorized and empowered to build, construct, maintain and operate and own water works in the City of Anoka, to supply said city and its inhabitants with pure and wholesome water, suitable for domestic, manufacturing and fire purposes; to lay down pipes and water mains for the purpose of conveying water through the streets, avenues, alleys and public grounds of said city; \* \* \*

said grantees, their legal representatives or assigns to have the right to establish, construct, maintain and operate said water works as herein specified for the term of thirty-one years from the date of the passage and acceptance of this ordinance and all rights and liabilities as hereinafter provided, to continue in force for another like period of thirty-one years, unless sooner terminated by the purchase of said works by said City of Anoka, as hereinafter provided, subject, however, to the provisions of section 8 of this ordinance."

"Section VI. The said grantees, their heirs or assigns, shall not charge to consumers during the continuance of the franchise granted by this ordinance, exceeding the following rates, which shall be collected in quarter-annual installments, in advance:  
\* \* \*."

"Section VIII. In consideration of the benefits which shall be derived by the said city and its inhabitants from the construction and operation of said water works, and in further consideration of the water supply hereby secured for public uses, and as the inducement for the said grantees to enter upon the construction of the said water works, the city of Anoka hereby rents of the said grantees, their heirs or assigns, for the uses hereinafter mentioned, the said fifty (50) hydrants for and during the term of thirty-one (31) years, and no longer, from the date of the acceptance of this ordinance or until the purchase of said works by said city, if the same are purchased by said city, prior to the expiration of said term; \* \* \* and agrees to pay rent — dollars per annum for each and every hydrant \* \* \* during the aforesaid term of thirty-one (31) years \* \* \*."

#### Ordinance No. 74.

241 "Section 1. That Edmund T. Sykes, Edward D. Brown and J. A. Chase, of the city of Minneapolis, Minnesota, their legal representatives, heirs or assigns, be, and they are, under the conditions, covenants and agreements hereinafter contained, but subject to the right of purchase, provided for in Ordinance number 73 of said city, hereby authorized and empowered to build and construct, maintain and operate an electric light plant in the city of Anoka, to supply said city and its inhabitants with electric lights, to use within the present and future limits of said city, any and all streets, alleys, and public grounds, as are now or may be hereafter laid out; \* \* \* Said grantees, their legal representatives, or assigns to have the right to establish, construct, maintain and operate said electric light plant, as herein specified, for the term of thirty-one (31) years from the date of the acceptance of this ordinance, and all rights and liabilities as herein provided to continue in force for another like period of thirty-one (31) years, unless sooner terminated by the purchase of said plant by said city of Anoka."

"Sec. VIII. The city of Anoka shall pay, per annum to the grantees, their heirs or assigns, for the full term of thirty-one (31)

years and no longer, from the acceptance of this ordinance by said grantees, at least the sum of two thousand one hundred and twelve (\$2,112) dollars, payable semi-annually, for lighting said city, as herein specified."

The court held that the provisions in the charter gave the city power to enter into the contracts and that the same were binding upon the city.

This same charter of the City of Anoka and the same franchise ordinances were again before the court in the case of Reed v. City of Anoka, 85 Minn. 294. This was a case brought by a taxpayer in his own behalf and in behalf of others to have the franchise contracts canceled and the city restrained from carrying them out. The court in its opinion used the following language:

"The authority under which the city acted in entering into the contracts is found in the provisions of its charter, which, among other things, confer upon the municipality, in substance: (a) Power to make and establish public pumps, wells, cisterns, and hydrants, and to provide for and control the erection of water-works for the supply of water for the city and its inhabitants; (b) power to provide for lighting the city with electricity, gas, or other means, and to control the erection of any works for that purpose, and to grant to any corporation or person the right to occupy its streets for that purpose. There can be no doubt but that these charter provisions confer upon the municipality authority to enter into contracts with individuals for the purpose of providing itself and its inhabitants with a supply of water, and for the purpose of lighting the city. \* \* \*

"We do not understand appellants to contend that the charter provisions are insufficient to authorize contracts for the purposes stated. What they do contend is that the contracts are void on their face because and for the reason that they cover a term of thirty-one years, and definitely and finally fix and determine the rates of compensation to be paid the grantees for the full period, and thus, in effect, barter and contract away legislative functions of the municipality; it being claimed in this behalf that the right to fix rates and charges to be paid for water and light furnished by the grantees under the contracts is purely legislative, and that the city council which entered into the contracts could create no binding obligation in respect to such charges and compensation to extend beyond the term of their office.

"The argument is that, though the general right and power to contract does not necessarily involve the exercise of legislative functions, the power to fix rates and charges to be paid by the municipality in consideration of the performance of contracts does, and that, in consequence, any regulation one council might see fit to make on that subject could be binding, in no proper view of the law, upon a succeeding council. The reasoning to support this position is not tenable, and to adopt it as the law would effectually destroy, or at least render merely nominal, the right of municipalities to enter into contracts of this character, however great their necessities \* \* \* It

would be extremely illogical to hold that such contracts could be lawfully made and entered into, provided they did not extend in duration beyond the term of office of the council by which they are made, and would tend to render the exercise of the power by municipalities practically valueless. \* \* \* Clearly, the court should not interfere and set aside the contracts merely because they fix rates and charges beyond the term of office of the council fixing them. The most the court could do in any such case would be to hold that each succeeding council could, in the exercise of its discretionary powers by ordinance or resolution revise the rates previously fixed. But such cannot be held to be the law. To so hold would result in overturning contracts heretofore made in good faith, upon which large investments of capital have been made, and place those who have thus invested their money at the mercy of public agitation and clamor."

The parallelism between the Reed case and the case at bar is striking. The charter provisions are essentially the same as to the powers of the cities.

The ordinance provisions are essentially the same as to the grant of franchises, as to a long-time period and as to a maximum charge for service.

The Reed case in my judgment is conclusive as to the construction to be placed upon the charter of the defendant city and its power to make the contract in question; also as to the construction to be placed upon the maximum rate provision contained in the contractual franchise ordinance.

See also City of St. Cloud v. Water, Light & Power Co., 88 Minn. 329.

In view of the foregoing authorities, and in view of the language contained in the charter of the defendant City of St. Cloud, I am of opinion that the defendant city had ample power to enter into the contract providing for the maximum rate for gas as contained in section 6 of the contractual franchise ordinance No. 160. Since section 6 is a part of the contract ordinance, and is itself contractual,

and since it is not void for lack of authority in the city, but  
243 valid and authorized by the charter of the defendant city, it follows that chapter 469 of the Laws of 1919, Minnesota, does not apply to the present situation of the plaintiff and the city, and that said chapter 469, by reason of the proviso in section 1 thereof, did not authorize the action of the plaintiff company taken in August 1920 in attempting to proceed thereunder.

The language of the court in the Lenawee County case, *supra*, in holding that a statute of Michigan creating a public utilities commission did not by reason of express provision of the statute give it control of rate contracts heretofore made is apposite here:

"That the legislature took cognizance of and prohibited altering without consent of the interested municipality and company any franchise or agreement relative to rates gives room for possible inference of ratification, or at least approval, of contract relations between those bodies touching rates."

It also follows, since there is a valid and subsisting contract between the city and the plaintiff company governing the matter of a maximum rate for fuel gas, and since there is no showing that the contract was not fairly entered into, or any fraud or misrepresentation, that a court of equity can not grant the relief asked for plaintiff.

Columbus Ry. L. & P. Co. v. Columbus, 249 U. S. 399;  
Moorhead v. Union L. & P. Co., 255 Fed. 920;  
Lenawee Co. Gas & E. Co. v. Adrian, 176 N. W. 590;  
Hillsdale Gaslight Co. v. City, 258 Fed. 485;  
Mich. Ry. Co. v. City of Lansing, 260 Fed. 322.

The remarks made by Judge Amidon in the Moorhead case are apposite here:

The situation disclosed by the cross-bill, if it is a true picture of the actual effect of the rates upon defendant's business, is such as might lead a just man in private life to modify a contract. It is within the power of the city council to modify a contract. In states having a public utility commission vested with full authority to deal with the subject of rates, such, for example, as Massachusetts, New York, Wisconsin, and California, those commissions have exercised their powers to increase rates when they were unreasonably low just as freely as to reduce them when they were unreasonably high. Unfortunately there is no commission in the state of Minnesota clothed with such a power. The same is true in North Dakota. A commission which is powerless to protect the public is also powerless to protect the company. Relief against such a situation, however, can be found only in the Legislature, and will not justify courts in assuming legislative powers."

244 In view of the foregoing conclusions, it follows that orders must be entered denying plaintiff's motion for preliminary injunction, and granting defendant's motion to dismiss the bill for lack of equity.

WILBUR F. BOOTH,  
*Judge.*

Filed in U. S. District Court March 23, 1921.

245 United States District Court, District of Minnesota, Sixth Division, November Term, 1921.

## Equity Journal.

April 16th, 1921.

Present: Honorable Wilbur F. Booth, Judge,

United States District Court, District of Minnesota, Sixth Division.  
No. 117. Equity.

ST. CLOUD PUBLIC SERVICE COMPANY, Plaintiff,  
vs.

CITY OF ST. CLOUD, Defendant.

*Final Decree.*

This cause came on for hearing upon motion by the plaintiff for a preliminary injunction against the defendant, its Commission and officers, restraining them from in any manner interfering with plaintiff in raising the rate to be charged for fuel gas in the City of St. Cloud to the sum of Three and 39/100 dollars (\$3.39) per thousand cubic feet, or from instituting any suit against plaintiff to interfere with plaintiff in putting into effect said rate, or from attempting to force plaintiff to sell fuel gas at the rate prescribed in the ordinance set forth in the complaint, and upon the motion of the defendant to dismiss the bill of complaint for want of equity in said action,

It is hereby ordered, adjudged and decreed, that the bill of complaint herein be, and the same is hereby dismissed for want of equity, and plaintiff's motion for a preliminary injunction be, and the same is hereby, in all respects denied.

WILBUR F. BOOTH,  
*United States District Judge.*

Let the foregoing decree be forthwith filed and entered of record.

WILBUR F. BOOTH,  
*United States District Judge.*

Filed and entered in U. S. District Court April 16, 1921.

246 United States District Court, District of Minnesota, Sixth Division.

ST. CLOUD PUBLIC SERVICE COMPANY, Plaintiff,  
vs.

CITY OF ST. CLOUD, Defendant.

*Petition of the Plaintiff for an Appeal.*

And now comes St. Cloud Public Service Company, the above named plaintiff, and alleges that it is advised and verily believes that it is aggrieved by the final decree made and entered in said

cause on the 16th day of April 1921, wherein it was ordered, adjudged and decreed that the bill of complaint herein be, and the same is hereby, dismissed for want of equity and plaintiff's motion for a preliminary injunction be, and the same is hereby, in all respects denied; and therefore, it appeals from said final decree to the Supreme Court of the United States and prays that said appeal be allowed and that a transcript of the records, proceedings and papers upon which said final decree was based and made be duly authenticated and transmitted to said Supreme Court of the United States, and with this its petition for the allowance of said appeal, said petitioner does hereby file an assignment of errors which it will assert, rely upon and urge in support of its said appeal and before  
247 said the Supreme Court of the United States, and your petitioner will ever pray.

COBB, WHEELWRIGHT & BENSON,  
Minneapolis, Minnesota;  
J. D. SULLIVAN,  
St. Cloud, Minnesota;  
PIERCE BUTLER,  
St. Paul, Minnesota,  
*Solicitors and Attorneys for Plaintiff.*

J. O. P. WHEELWRIGHT,  
PIERCE BUTLER,  
*Of Counsel.*

Filed in U. S. District Court May 27, 1921.

248 United States District Court, District of Minnesota, Sixth Division.

ST. CLOUD PUBLIC SERVICE COMPANY, Plaintiff,  
vs.

CITY OF ST. CLOUD, Defendant.

*Assignment of Errors on Appeal from the Final Decree in Favor of the Defendant.*

And now comes the above named plaintiff and appellant, St. Cloud Public Service Company and shows that in the records and proceedings of the said Court in the above entitled cause and in the final decree made and entered therein on the 16th day of April, 1921, there is manifest error, and it hereby files the following assignment of errors upon which it will rely upon its prosecution of the appeal to the Supreme Court of the United States in the above entitled cause:

1. It was error for the District Court to hold that the defendant City of St. Cloud had the power to enter into the contract providing for the maximum rate for gas as contained in Section 6 of Ordinance #160 of the City Council of the City of St. Cloud, being the ordinance described and set forth in the bill of complaint and answer herein.

2. It was error for the District Court to hold that there was in fact  
a contract made between the said defendant City of St. Cloud  
249 and plaintiff's predecessor mentioned in the bill of complaint  
and answer herein, as to rates for gas by the passage and  
acceptance of said Ordinance #160.

3. It was error for the District Court by its order to deny plaintiff's motion for a preliminary injunction against the defendant, its commission and officers, restraining them from in any manner interfering with the plaintiff in raising the rate to be charged for fuel gas in the City of St. Cloud to the sum of three and 39/100 dollars (\$3.39) per thousand cubic feet, or from instituting any suit against plaintiff to interfere with it in putting into effect said rate or from attempting to force plaintiff to sell fuel gas at the rate prescribed in the ordinance set forth in the bill of complaint.

4. It was error for the District Court by its order to grant defendant's motion to dismiss the bill of complaint for want of equity.

5. It was error for the District Court by its final decree to dismiss plaintiff's bill of complaint for want of equity.

6. It was error for the District Court by its final decree to deny plaintiff's motion for said preliminary injunction.

Wherefore and in order that the foregoing assignment of errors may be and appear of record the plaintiff presents the same to the Court and prays that such disposition may be made thereof as is in accordance with the law and the statutes of the United States in such case made and provided, and plaintiff prays that its final decree made and entered by the District Court in this action on the 250 16th day of April, A. D. 1921, may be reversed.

COBB, WHEELWRIGHT & BENSON,  
Minneapolis, Minnesota;  
J. D. SULLIVAN,  
St. Cloud, Minnesota;  
PIERCE BUTLER,  
St. Paul, Minnesota,  
*Solicitors and Attorneys for Plaintiff-Appellant.*

J. O. P. WHEELWRIGHT,  
PIERCE BUTLER,  
*Of Counsel.*

Filed in U. S. District Court May 27, 1921.

251 United States District Court, District of Minnesota, Sixth Division.

ST. CLOUD PUBLIC SERVICE COMPANY, Plaintiff,  
vs.

CITY OF ST. CLOUD, Defendant.

*Order Allowing Appeal.*

On reading and filing the petition of St. Cloud Public Service Company, the above named plaintiff, praying the allowance of its appeal from the final decree in said cause made and entered on the 16th day of April 1921, and on reading and filing the assignment of errors on which it relies on said appeal, and taking notice of the pleadings and proceedings and said final decree in said cause, and it appearing that said plaintiff is entitled to take and prosecute an appeal from said final decree to the Supreme Court of the United States,

It is ordered, that said appeal be, and the same is hereby, granted and allowed as prayed for in said petition upon the execution by said plaintiff or causing to be executed and filed in said Court of a bond in the sum of five hundred dollars (\$500), to the satisfaction of the Court as a bond for costs and damages on appeal, conditioned that said appellant shall prosecute its said appeal to effect and 252 answer all costs and damages if it shall fail to make good its plea.

Done in open Court this 26th day of May, A. D. 1921.

WILBUR F. BOOTH,  
*District Judge.*

Filed in U. S. District Court May 27, 1921.

253 United States District Court, District of Minnesota, Sixth Division.

ST. CLOUD PUBLIC SERVICE COMPANY, Plaintiff,  
vs.

CITY OF ST. CLOUD, Defendant.

*Bond on Appeal.*

Know all men by these presents, That we, St. Cloud Public Service Company, as principal, and A. G. Whitney and Wheelock Whitney, as sureties, are held and firmly bound unto the City of St. Cloud, the above-named defendant, in the full and just sum of five hundred dollars (\$500.), to be paid to it, its successors or assigns, for which payment well and truly to be made we bind ourselves, our successors and our heirs, jointly and severally by these presents.

Sealed with our seals and dated this 14th day of May, A. D. 1921.

Whereas, lately at the November 1920 term of the District Court of the United States, for the District of Minnesota, Sixth Division, in a suit in equity in which the St. Cloud Public Service Company is plaintiff, and the City of St. Cloud is defendant, a final decree was rendered and entered in said Court on the 16th day of April 1921, in which among other things it was ordered, adjudged and decreed

254 that the bill of complaint herein be, and the same is hereby dismissed for want of equity, and plaintiff's motion for a preliminary injunction be, and the same is hereby, in all respects denied; and

Whereas, said plaintiff has obtained an appeal from said Court to reverse the judgment in the aforesaid suit and a citation directed to said defendant citing and admonishing it to be and appear at the Supreme Court of the United States at the City of Washington, D. C. within thirty days from and after the date of said citation.

Now the condition of the above named obligation is such that if the said St. Cloud Public Service Company, the above named plaintiff, shall prosecute said appeal to effect and answer all damages and costs if it fails to make good its plea, then the above obligation to be void, else to remain in full force and virtue.

[Corporate Seal.] ST. CLOUD PUBLIC SERVICE COMPANY,  
By A. G. WHITNEY, *Its President.*  
ALBERT G. WHITNEY. [SEAL.]  
WHEELOCK WHITNEY. [SEAL.]

Signed sealed and delivered in presence of  
G. W. PLANK.  
MATHILDA GLASS.

255 STATE OF MINNESOTA,  
*County of Stearns, ss:*

On this 14th day of May, 1921, before me a Notary Public within and for said County, personally appeared A. G. Whitney to me personally known, who being duly sworn did say that he, the said A. G. Whitney is the President of the St. Cloud Public Service Company, the corporation named in the foregoing instrument, and that the seal affixed to said instrument is the corporate seal of said Company, and that said instrument was signed on behalf of said corporation by authority of its Board of Directors, and said A. G. Whitney acknowledged said instrument to be the free act and deed of said corporation.

[Notarial Seal] G. W. PLANK,  
*Notary Public, County of Stearns, Minnesota.*

My commission expires Aug. 25, 1922.

STATE OF MINNESOTA,  
*County of Stearns, ss:*

On this 14th day of May, 1921, before me a Notary Public within and for said County personally appeared A. G. Whitney and Wheelock Whitney, to me known to be the persons described in and who

executed the foregoing instrument and they severally acknowledged that they executed the same as their free act and deed.

[Notarial Seal.]

G. W. PLANK,

*Notary Public, County of Stearns, Minnesota.*

My commission expires Aug. 25, 1922.

STATE OF MINNESOTA,

*County of Stearns, ss:*

A. G. Whitney and Wheelock Whitney being first duly sworn say each for himself, that he is a resident and freeholder in the County of Stearns and State of Minnesota, and worth the sum of two thousand dollars (\$2,000) above his debts and exclusive of his property exempt from sale on execution.

A. G. WHITNEY.

WHEELOCK WHITNEY.

Subscribed and sworn to before me this 14th day of May, 1921.  
[Notarial Seal.]

G. W. PLANK,

*Notary Public, County of Stearns, Minnesota.*

My commission expires Aug. 25, 1922.

The foregoing bond and the sureties thereon are hereby approved this 26th day of May, 1921.

WILBUR F. BOOTH,

*Judge.*

Filed in U. S. District Court May 27, 1921.

*Return on Service of Writ.*

UNITED STATES OF AMERICA,

*District of Minn., ss:*

I hereby certify and return that I served the annexed Citation on the therein-named City of St. Cloud by handing to and leaving a true and correct copy thereof with R. B. Brower, City Attorney for the City of St. Cloud personally at St. Cloud in said District on the 1st day of June, A. D. 1921.

JOSEPH A. WESSEL,

*U. S. Marshal,*

By D. C. HORSNELL,

*Deputy.*

- 257 United States District Court, District of Minnesota, Sixth Division.

ST. CLOUD PUBLIC SERVICE COMPANY, Plaintiff,

vs.

CITY OF ST. CLOUD, Defendant.

*Citation.*

United States of America to the City of St. Cloud, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at the City of Washington, D. C., within thirty days from and after the day this citation bears date pursuant to appeal allowed and filed in the Clerk's office of the United States District Court for the District of Minnesota, Sixth Division, wherein St. Cloud Public Service Company is appellant, and you are appellee, to show cause, if any there be, why the final decree in said cause should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable Wilbur F. Booth, United States District Judge for the District of Minnesota this 26th day of May, A. D. 1921.

WILBUR F. BOOTH,  
*District Judge.*

Due service of the foregoing citation by copy at St. Cloud, Minnesota, is hereby admitted this — day of May, A. D. 1921.

*Solicitor for Appellee.*

- 258 [Endorsed:] Original. #117, Eq. United States District Court, District of Minnesota, Sixth Division. St. Cloud Public Service Company vs. City of St. Cloud. Citation. Filed Jun. 4, 1921. Charles L. Spencer, Clerk, by L. A. Levorsen, Deputy Cobb, Wheelwright & Benson, Lawyers, 311 Nicollet Avenue, Minneapolis, Minnesota.

- 259 United States District Court, District of Minnesota, Sixth Division.

ST. CLOUD PUBLIC SERVICE COMPANY, Complainant,

vs.

CITY OF ST. CLOUD, Defendant.

*Præcipe.*

To the Clerk of the above-named Court:

You will please make a transcript in the above entitled case and send and forward the same to the Supreme Court of the United States

at Washington, District of Columbia. You will please include therein the following:

1. Petition of complainant for an appeal.
2. Order allowing appeal.
3. Bond on appeal.
4. Assignments of error.
5. Citation.
6. Amended bill in equity.
7. Notice of motion and order to show cause why a preliminary injunction should not be granted.
8. Affidavit of A. G. Whitney.
9. Affidavit of A. J. Luick.
10. Affidavit of George F. Grote.
11. Affidavit of W. A. Durst.
12. Motion of defendant to dismiss.
13. Order to show cause for a hearing upon said motion to dismiss.
14. Answer.

260      15. Rebutting affidavit of A. G. Whitney.

16. Order of Court denying motion for preliminary injunction.
17. Order of Court dismissing complaint for want of equity.
18. Opinion of the Court.
19. Final decree.
20. This præcipe.

Dated this 26th day of May, 1921.

COBB, WHEELWRIGHT & BENSON,  
Minneapolis, Minnesota;  
J. D. SULLIVAN,  
St. Cloud, Minnesota;  
PIERCE BUTLER,  
St. Paul, Minnesota,  
*Attorneys for Complainant.*

Due service of the within præcipe by copy thereof is hereby admitted at St. Cloud, Minnesota, this — day of May 1921.

*Attorney for Defendant.*

261 *Return on Service of Writ.*UNITED STATES OF AMERICA,  
*District of Minnesota, ss:*

I hereby certify and return that I served the annexed Praecept on the therein-named City of St. Cloud, by handing to and leaving a true and correct copy thereof with R. B. Brower, City Attorney for the City of St. Cloud, personally at St. Cloud, in said District, on the 1st day of June, A. D. 1921.

JOSEPH A. WESSEL,  
*U. S. Marshal,*  
By D. C. HORSNELL,  
*Deputy.*

Filed in U. S. District Court June 4, 1921.

262 United States District Court District of Minnesota, Sixth Division.

ST. CLOUD PUBLIC SERVICE COMPANY, Complainant,  
vs.

CITY OF ST. CLOUD, Defendant.

*Defendant's Praecept.*

To the Clerk of the Above Named Court:

You will please add to the transcript in the above entitled case, and include in same when forwarded to the Supreme Court of the United States, at Washington, District of Columbia, the following portions of the record:

1. Appearance of R. B. Brower for the defendant.
2. Defendant's answer.
3. Affidavit of R. B. Brower.
4. Affidavit of Olof Erick, and others.
5. Affidavit of A. W. Buckman.
6. Affidavit of Alvah Eastman.
7. Affidavit of A. A. Wright.
8. Affidavit of William W. Matson, Julius Adams and Henry Maybury.
9. Affidavit of Henry P. Steckling, and others.
10. Affidavit of Sylvester J. Hunt.
11. Affidavit of Louis P. Wolff.
12. Valuation of gas plant by L. P. Wolff.

13. Order granting motion to dismiss Bill of Complaint, with Court's Memorandum thereto attached.

14. This preceipe.

Dated, this 7th day of June, A. D. 1921.

St. Cloud Minn. R. B. BROWER,  
Attorney for Defendant.

263 Filed in U. S. District Court June 9, 1921.

264 United States District Court, District of Minnesota, Sixth Division.

ST. CLOUD PUBLIC SERVICE COMPANY, Complainant,  
vs.

CITY OF ST. CLOUD, Defendant.

*Order Enlarging Time to Docket Cause and File Record in the Appellate Court.*

For good cause shown, I, the Judge of said Court who signed the citation in the above entitled cause upon an appeal to the Supreme Court of the United States, do hereby enlarge the time within which said cause may be docketed and the record thereof filed in the Supreme Court of the United States so that said cause may be so docketed and said record so filed on or before the 15th day of July, 1921.

Dated this 8th day of June, 1921.

WILBUR F. BOOTH, Judge.

265 [Endorsed:] Original. #117 Eq. United States District Court District of Minnesota, Sixth Division. St. Cloud Public Service Co. vs. City of St. Cloud. Order Enlarging Time to Docket Cause and File Record in the Appellate Court. Filed Jun. 8, 1921. Charles L. Spence, Clerk, By L. A. Levorsen, Deputy. Cobb, Wheelwright & Benson, Lawyers, 311 Nicollet Avenue, Minneapolis, Minnesota. Equity Journal, Vol. 7.

266 United States District Court, District of Minnesota, Sixth Division.

ST. CLOUD PUBLIC SERVICE COMPANY, Complainant,  
vs.

CITY OF ST. CLOUD, Defendant.

*Order Enlarging Time to Docket Cause and File Record in the Appellate Court.*

For good cause shown, I, the Judge of said Court who signed the citation in the above entitled cause upon an appeal to the Supreme Court of the United States, do hereby enlarge the time within which

said cause may be docketed and the record thereof filed in the Supreme Court of the United States so that said cause may be so docketed and said record so filed on or before the 15th day of August, 1921.

Dated this 5th day of July, 1921.

WILBUR F. BOOTH,  
*Judge.*

267 [Endorsed:] #117 Eq. United States District Court, District of Minnesota, Sixth Division. St. Cloud Public Service Co. vs. City of St. Cloud. Order Enlarging Time to Docket Cause and File Record in the Appellate Court. Filed July 5, 1921. Charles L. Spencer, Clerk, By L. A. Levorsen, Deputy. Cobb, Wheelwright & Benson, Lawyers, 311 Nicollet Avenue, Minneapolis, Minn. Eq. Journal, Vol. 7.

268 UNITED STATES OF AMERICA:

District Court of the United States, District of Minnesota, Sixth Division.

I, Charles L. Spencer, Clerk of said District Court, do hereby certify and return to the Honorable, the Supreme Court of the United States, that the foregoing, consisting of 267 pages, numbered consecutively from 1 to 267, inclusive, is a true and complete transcript of the Records, Process, Pleadings, Orders, Final Decree and all other proceedings in said cause as are designated and enumerated in the praecipes for such transcript filed by solicitors for the respective parties and shown at pages 258 to 263, inclusive, and of the whole thereof, as appears from the original records and files of said Court; and I do further certify and return, that I have annexed to said transcript, and included within said paging, the original citation, together with the proof of service thereof; also the originals of the orders of the Court enlarging the time for filing this record and docketing the cause in the Supreme Court of the United States to August 15th, 1921.

In witness whereof, I have hereunto set my hand, and affixed the seal of said Court, at Fergus Falls, in the District of Minnesota, this 2nd day of August, A. D. 1921.

[Seal of U. S. Dist. Court, Dist. of Minnesota, Sixth Division.]

CHARLES L. SPENCER,  
*Clerk,*

By L. A. LEVORSEN,  
*Deputy.*

Endorsed on cover: File No. 28,427. Minnesota D. C. U. S. Term No. 472. St. Cloud Public Service Company, appellant, vs. City of St. Cloud. Filed August 15, 1921. File No. 28,427.



Office Supreme Court, U. S.  
FILED  
MAY 5 1922  
WM. R. STANSBURY  
CLERK

# Supreme Court of the United States.

OCTOBER TERM 1921.

No.

 150 10

ST. CLOUD PUBLIC SERVICE COMPANY,

*Appellant,*

*v.s.*

CITY OF ST. CLOUD,

*Appellee.*

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## Brief on Behalf of Appellant.

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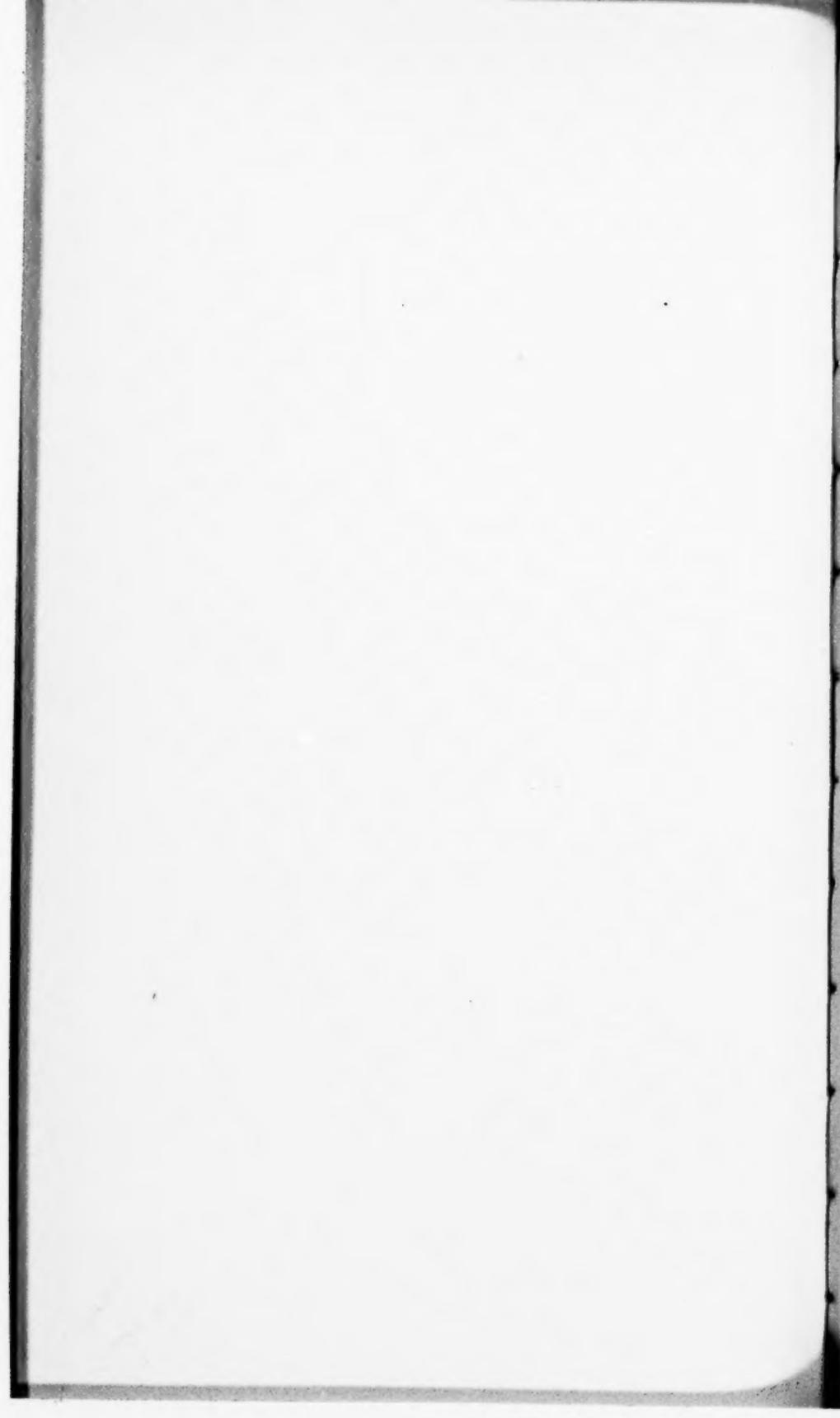
J. O. P. WHEELWRIGHT,

*Minneapolis, Minnesota,*

PIERCE BUTLER,

*St. Paul, Minnesota,*

*Solicitors and Attorneys for Appellant.*



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# **Supreme Court of the United States.**

OCTOBER TERM 1921.

No. 472.

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ST. CLOUD PUBLIC SERVICE COMPANY,

*Appellant,*

*vs.*

CITY OF ST. CLOUD,

*Appellee.*

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## **Brief on Behalf of Appellant.**

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### **STATEMENT.**

This is an appeal from a final decree of the United States District Court, District of Minnesota, Sixth Division, dismissing the bill for want of equity and denying appellant's motion for a preliminary injunction (see Decree, p. 162). The appellant will be hereinafter referred to as the complainant and the appellee as the defendant.

The complainant is a public service corporation organized under the laws of the state of Minnesota, and among other things is engaged in the business of supplying the city of St. Cloud, Minnesota, and its inhabitants with fuel gas.

The charter of the defendant city was originally

contained in a special act of the legislature of Minnesota, approved March 8, 1862, and an act approved March 6, 1868, and acts amendatory thereto. These acts were consolidated by an act approved April 13, 1889, Special Laws 1889, Chapter 6. This act is entitled, "An act to consolidate in one act the charter of the city of St. Cloud and to amend the same." The act is divided into chapters. Section 1, Chapter 1, of the act provides that the city

"shall be a municipal corporation, by the name of the 'city of Saint Cloud'; \* \* \* shall be capable of contracting and being contracted with; and shall have all the powers possessed by municipal corporations at common law, and in addition thereto shall possess all powers hereinafter granted. \* \* \*"

**Section 4 of Chapter 4 of the act provides:**

"Sec. 4. The common council in addition to all powers herein contained and specifically mentioned, shall have full power and authority to make, enact, ordain, establish, publish, enforce, alter, modify and repeal and amend all such ordinances, by-laws, rules and regulations, for the government and good order of the city, for the suppression of vice and intemperance; for the prevention of crime, and for the general welfare of the city and the inhabitants thereof, as they shall deem expedient. \* \* \*"

**Section 5 of Chapter 4 of the act provides:**

"The common council shall have full power by ordinance: \* \* \*

10th. \* \* \* \* To provide for and control the erection and operation of gas works, elec-

tric lights, or other works or material for lighting the streets and alleys, public grounds, and buildings of said city, and supplying light and power to said city and its inhabitants; and to grant the right to erect, maintain and operate such works, with all rights incident or pertaining thereto, to one or more private companies or corporation, and to control the erection and operation of such works and laying of pipes, mains, and wires into, through and under the streets, avenues, alleys and public grounds of said city, and the erection of poles and mainstays, and the stringing of wires thereon, over, in, upon, and across the streets, alleys and public grounds; to provide for and control the erection and operation of works for heating the public buildings of said city by steam, gas, or other means, and supplying light, heat, and power to the inhabitants of said city; to grant the right to erect such works and all incident rights to one or more private companies or corporations, and to control and regulate the erection and operation of such works, and the laying of mains into, through, and under the streets, alleys, and public grounds of said city; provided, that every grant to a company or corporation of the right to erect or maintain any of said works shall provide that the city or its successors may purchase the same at such time and in such manner as shall be prescribed in the grant; and provided further, that the common council shall have authority to regulate and prescribe the fees and rates and charges of any and all companies hereinbefore mentioned."

**Subdivision 34 of Section 5, Chapter 4, of the act:**

"34th. To regulate and control the quality and measurement of gas. To prescribe and enforce rules and regulations for the manu-

facture and sale of gas, the location and construction of gas works, and the laying, maintaining and repairing of gas pipes, mains and fixtures to provide for the inspection of gas and gas meters, and to appoint an inspector if needed and to prescribe his duties."

Section 7, Chapter 14, of the act provides:

"Sec. 7. No law of the state concerning the provisions of this act, shall be considered as repealing, amending, or modifying the same, unless said purpose be expressly set forth in such law" (see memorandum of trial judge, pp. 150, 151.)

The defendant operated under this charter until November 28, 1911, when it adopted a home rule charter under the provisions of law of the state of Minnesota governing the adoption by municipalities of home rule charters. The latter charter contained the same powers as those hereinbefore recited as being contained in the Special Laws of 1889 (R., p. 27).

On the 19th day of December, 1905, defendant's common council granted to plaintiff's predecessor an ordinance entitled, "An ordinance granting the right to acquire, construct, maintain and operate works for the production, manufacture and sale of electricity and for the manufacture and sale of gas in the city of St. Cloud, Minn."

Sections 5 and 6 of the ordinance read as follows:

"Section 5. In consideration of the rights and privileges herein granted, the grantee hereby covenants and agrees that it will prior

to the first day of January, A. D. 1907, erect or cause to be erected in the city of St. Cloud, an efficient coal gas generating plant or system of ample capacity, and after the erection thereof will manufacture and offer for sale to the city and its inhabitants coal gas of at least fourteen candle power, and in the meantime will furnish gas from the present gas works of the grantee of the standard now manufactured therein.

Section 6. The grantee is authorized hereby to sell illuminating gas when the works therefor shall have been completed, of a standard of fourteen candle power at the price of not to exceed one dollar and 85/100 (\$1.85) per thousand cubic feet, and fuel gas at the rate of not to exceed one and 35/100 dollars (\$1.35) per thousand cubic feet, and the grantee shall be at liberty to cut off the supply from any person failing or refusing to pay for gas furnished for a period of thirty days" (R., pp. 2 and 3).

The bill challenged the ordinance rate for fuel gas (no other kind of gas being sold by complainant), as confiscatory and non-compensatory and a taking of complainant's property without due process of law and in violation of the Fourteenth Amendment to the Constitution of the United States.

The amended bill alleges (pp. 5-17) that immediately after the passage of said ordinance the grantee therein named erected an efficient coal and water gas generating system in the defendant city of ample capacity and finished the erection thereof within the time specified by Section 5 of the ordinance and until the 17th day of August, 1915, was

continuously engaged in the business of generating, selling and distributing fuel gas to the defendant and to its inhabitants of the standard demanded by said ordinance through and by means of said generating plant. That on the 17th day of August, 1915, the grantee named in the ordinance sold and conveyed all of its property in the defendant city (including its electric plant and its said gas generating plant) to complainant and at the same time assigned and transferred to the complainant the ordinance before mentioned and all the grantee's right, title and interest therein and thereto and that since said last mentioned date complainant has been manufacturing, selling and distributing fuel gas to the defendant and to its inhabitants under said ordinance using and employing for that purpose the said generating plant before mentioned.

The amended bill further alleges that at the time of the filing of the original bill and for a long time prior thereto, and at the time of the filing of the amended bill the fair and reasonable value of the complainant's property owned by it, used and useful for the manufacture and distribution of gas to the defendant and its inhabitants was a sum in excess of \$444,000. The amended bill then alleges the actual cost year by year up to August 31, 1920, of its gas manufacturing plant showing that on said last mentioned date its actual cost was the sum of \$194,057.03.

In paragraph 9 of the bill it is stated that of the above amount the sum of \$29,875.54 and no more represented the value of complainant's gas prop-

erty in the defendant city installed and in use prior to the passage and approval of the ordinance hereinbefore mentioned. That some of the property represented by said sum of \$29,875.54 is still in use.

The bill further alleges that the cost item of \$194,057.03 did not include any of the following overhead charges:

- (a) Interest during construction.
- (b) Taxes or insurance.
- (c) Discount on bonds.
- (d) Any of the expenses incurred by the president and paid out by him on various trips to Chicago and Minneapolis in arranging with engineers, selling of bonds, buying of materials, etc.
- (e) No charge for bookkeeping or office rent and no charge for general superintendence of the president or manager during construction.

The bill alleges that complainant's properties are well located, planned and have been economically constructed. That they have always been well and economically and efficiently managed and they have always been and still are maintained in a first class condition so that the defendant and its inhabitants have always been furnished with proper and adequate gas service.

It is further charged in the bill that all of the expenses of complainant in the management and operation of its said gas business and those of its predecessor have been reasonable and have been as low in amount as could be made by economical management; the services of all officers, agents and employes have been secured as cheaply as prac-

ticable for good service and neither it nor its predecessor has ever had more of such officers, agents and employes than have been necessary for the proper conduct of said gas business in an efficient, proper and satisfactory manner.

The bill then alleges and shows the net earnings of the complainant and its predecessor from its gas business year by year commencing with the year ending December 31, 1908, and ending December 31, 1916.

The bill then alleges that for the year ending December 31, 1917, there was an actual operating deficit of \$3,938.31; and for the year ending December 31, 1918, an actual operating deficit of \$15,897.40; and for the year ending December 31, 1919, an operating deficit of \$21,129.80; and for the eight months ending October 31, 1920, an actual operating deficit of \$18,889.20.

The bill then alleges that the losses in operation above referred to were not due to any fault or neglect on the part of the complainant, but were due solely to the conditions arising out of the world war and the enormous increase in the cost of labor and of materials which entered into the manufacture of complainant's gas.

The bill then shows the net rates to consumers of gas and that since the first day of March, 1918, all gas has been sold at the ordinance rate of \$1.35 per thousand cubic feet.

The bill then alleges that the gas and electric operations of complainant and of its predecessor, the grantee named in the ordinance, as well as all

the operations of its street railway have always been and are now conducted as distinct and separate departments.

Tabulated statements are attached to the bill showing the prices paid by complainant for the coal, the coke and the oil used by it in the manufacture of its gas and the increase in such prices.

The bill further charged that according to the last state census for the year 1905 the defendant had a population of 8,866; and that on the 30th day of September, 1920, complainant had in use only 1,265 gas meters.

It was further alleged that the maximum rate fixed for the price of gas in the ordinance described in paragraph 4 hereof has never yielded to complainant or its predecessor a fair or reasonable return on the value of its property used and useful in said gas business; nor taking the whole term prescribed and fixed by said ordinance, assuming that the defendant never exercises the right to purchase complainant's gas plant as provided therein, or whether it does so or not, can the complainant ever make any fair or reasonable return on the value of its said property necessarily used and employed by it in its said gas business, nor as a matter of fact any return whatsoever.

It was further alleged that under the Constitution and laws of the state of Minnesota the defendant is a city of the fourth class. That on the 31st day of August, 1920, complainant presented to the commission of the city of St. Cloud a petition, a copy of which marked Exhibit "D" is hereto at-

tached and hereby made a part of the amended bill. That under the home rule charter of the city of St. Cloud said commission is the body to whom such petition should have been submitted. This petition was presented pursuant to Chapter 469 of the Session Laws of Minnesota for the year 1919. This act is as follows:

**"AN ACT TO EMPOWER ANY CITIES OF THE THIRD AND FOURTH CLASSES IN THE STATE OF MINNESOTA, WHETHER EXISTING UNDER A SPECIAL OR GENERAL LAW, OR UNDER A HOME RULE CHARTER, TO PRESCRIBE REASONABLE RATES UNDER WHICH PUBLIC SERVICE CORPORATIONS SUPPLYING GAS OR CURRENT FOR ELECTRIC LIGHTING OR POWER PURPOSES AND OCCUPYING THE STREETS AND PUBLIC PLACES OF ANY SUCH CITY MAY OPERATE WITHIN ANY SUCH CITY.**

Be it enacted by the legislature of the state of Minnesota:

**Section 1. RATES FOR GAS OR ELECTRIC CURRENT TO BE PRESCRIBED BY CITY COUNCIL.**—That in addition to all other powers now conferred upon any cities of the third and fourth classes in the state of Minnesota, whether existing under a general or special law or under a home rule charter, any such city is hereby authorized and empowered, through its city council or like governing body, by ordinance, to prescribe from time to time the rates which any public service corporation supplying gas or electric current for lighting or power purposes within said city may charge for such service. Provided, that nothing herein shall be construed to impair

the obligation of any contract or franchise provision now existing between any such city and any such public service corporation. It shall be the right and duty of any such council or governing body to prescribe a rate which shall permit any such corporation to make a reasonable return on the capital investment in the business, under an economical and efficient management of the same; and for the purpose of making such determination it shall be the duty of any such corporation, upon request by said council or other governing body, to give to any such council or other governing body or any authorized agent of such council or other governing body access to the books of any such corporation for the obtaining of such information as may be necessary and proper in the making of such determination. Provided, that in any case where any such corporation supplies gas or current for lighting or power purposes to customers outside the limits of any such city, any such city council in fixing the rates to be charged shall take into consideration the effect of such rates, if any, upon the rates to be charged to such customers living outside the limits of such city, but said city council shall not have power to fix the rates of customers supplied outside of the city limits.

**Sec. 2. HEARING ORDERED.** — Such rates shall be prescribed only after hearing and twenty days' notice of the time and place of such hearing shall have been given to such public service corporation, which notice shall be served in the manner prescribed by law for the service of summons in District Court. Such proceedings may be instituted by the council or other governing body of said city or upon petition of any such public service corporation, or upon petition of twenty-five

per cent of the customers served by such corporation within such city, and failure on the part of such council or other governing body to make a determination as to such rates within sixty days after such petition is filed with the clerk of said city shall be deemed a denial of such petition and a determination adverse to such petitioners, provided, however, that such council or other governing body of such city shall not be required to act upon the petition of any such public service corporation which shall refuse to give such council or other governing body access to the books of such corporation and other information relative to the operation of the business of such corporation necessary and proper to the determination of such rates. In case of the failure or refusal of any such public service corporation to give to such council or other governing body access to the books of such corporation or other information relative to the business of such corporation necessary and proper for such a determination such council or other governing body may proceed to determine and prescribe such rates upon such information and evidence as may be adduced at such hearing. The words 'public service corporation' as used in this act shall be construed to include any person, co-partnership or corporation supplying gas or electric current for lighting or power purposes to the public within any such city.

**Sec. 3. RIGHT OF APPEAL.**—Any such city, public service corporation or person aggrieved by any such determination of rates shall have the right of appeal from such determination to the District Court of the county in which such city, or any part thereof, is situated, at any time within twenty days after the filing of determination with the clerk of such

city. Said appeal shall be made by filing with the clerk of such city a written notice of appeal specifying the determination of such council or other governing body from which the appeal is taken. Thereupon such city clerk shall make out and file with the clerk of such District Court a copy of the determination of the council or other governing body from which such appeal is taken and of the notice of appeal, certified by such clerk to be true copies thereof, and shall transmit and file with the clerk of said court all papers in the case upon which such determination was made. There shall be no pleadings upon such appeal and the only question that shall be passed upon or considered shall be whether the rates prescribed by the determination of such council or other governing body of such city were fair and just to such public service corporation and the consumers and would permit such public service corporation a fair and reasonable return on the capital investment in the business under an economical and efficient management of the same. Such appeals shall have precedence over all other civil cases, except tax cases, and during the pendency of such appeal and until final determination of such appeal by the courts, the rates fixed and prescribed by such council or other governing body shall be and remain in force.

**Sec. 4.** This act shall take effect and be in force from and after its passage.

Approved April 25, 1919."

It was further alleged that on the 28th day of September, 1920, said petition was rejected by said commission without any consideration thereof upon the merits, but solely upon the ground that said commission had no jurisdiction to entertain

such a petition.

It was again re-alleged that no time since the passage and approval of the ordinance has the maximum rate to be charged for gas to be fixed therein been adequate or sufficient to pay complainant's necessary operating expenses or that of its predecessor in the manufacture and distribution of its gas and yield a fair or reasonable return on the fair value of said property necessarily devoted to said gas business and to public use; that since the first day of January, 1917, said maximum rate has not been adequate or sufficient to even pay said complainant's operating expenses necessarily expended in the operation of its said gas business.

It was further charged that in order to pay its necessary operating expenses complainant must have at least a rate of \$1.90 per thousand cubic feet and in order to pay its operating expenses and to secure a fair and reasonable return on the fair value of its property necessarily devoted to its gas business, a rate of \$3.39 per thousand cubic feet is necessary, and that complainant intends to increase its said present rate to said price of \$3.39 per thousand cubic feet.

The bill further charged that said present maximum rate fixed by said ordinance is inadequate and confiscatory, the effect of which is to deprive complainant of its property without due process of law and to take it for public use without just compensation, in violation of the Fourteenth Amendment to the Constitution of the United States.

It was further alleged that unless the defendant

is enjoined and restrained from so doing it will attempt to force complainant to continue to sell its gas at the maximum rate prescribed by said ordinance and any interference with the collection of such increased rate which complainant proposes to charge will deprive it of its property without due process of law and take it for public use without just compensation in violation of the Fourteenth Amendment to the Constitution of the United States.

It was further alleged that controversies, confusion, risks and multiplicity of suits will result from the resistance of the complainant to the enforcement of the said inadequate and confiscatory rates prescribed in said ordinance.

The bill further alleged that if the defendant should temporarily interfere (as it will do and as it threatens to do unless it is enjoined and restrained from so doing as hereinafter prayed) with the collection by complainant of its said proposed increased rate, the effect thereof would be to deprive complainant of its property, without due process of law and to take it for public use without just compensation, in violation of said amendment to the Constitution of the United States, and would result in inflicting great and irreparable loss and injury on complainant, all in violation of complainant's rights respecting the subject matter of the action, and any judgment of the court entered herein would be thereby rendered ineffectual.

The prayer of the bill was that the court adjudge and decree that the maximum rate to be charged

by complainant for its gas fixed by said ordinance is confiscatory and non-compensatory and to force complainant to continue to sell its gas at said rate would be to deprive it of its property without due process of law and to take it for public use without just compensation, in violation of the amendments to the Constitution of the United States.

That a permanent injunction be issued against the defendant, its city council and all of its officers, agents, attorneys, representatives and departments, restraining and enjoining them and each of them from in any manner, by ordinance or otherwise, interfering with the complainant in raising the rate to be charged for its gas to the sum of \$3.39 per thousand cubic feet; or from instituting or authorizing or directing any suit or suits, action or actions, or any proceeding whatsoever against the complainant, the object or purpose of which was to interfere with and restrain or enjoin the complainant from putting into effect said increased rate, or from attempting to force complainant to continue to sell its gas at the rates prescribed by said ordinance; and the bill prayed for a temporary or preliminary injunction restraining and enjoining the defendant, the city council, its commission, and all of its officers, etc., in each of the particulars aforesaid.

Upon the bill and upon the affidavits of A. G. Whitney (pp. 34-36), George F. Grotte (pp. 36-41), A. J. Luick (pp. 41-51) and W. A. Durst (p. 53), an order to show cause was issued to the defendant

why the preliminary injunction prayed for in the bill should not be granted (pp. 56-58). Defendant filed a motion to dismiss the action upon each and all of the following grounds:

1. That it conclusively appears that the complainant is furnishing gas service to the defendant and its inhabitants in compliance with the terms of a contractual ordinance limiting the maximum cost of fuel gas to the sum of \$1.35 per thousand cubic feet of gas, and that complainant is bound by said contractual ordinance.
2. For want of equity in said action.
3. That no federal question is involved in said action.
4. That the court has no jurisdiction in said cause (p. 112).

The motion for an injunction was denied (p. 141) and the one to dismiss the bill was granted (p. 142). It is apparent from the memorandum of the learned judge in the court below that the motion for an injunction was not heard upon its merits (p. 142).

It is apparent, also, from the memorandum, that the court below held that there was a federal question involved in the action and that it had jurisdiction, but granted the motion to dismiss solely on the grounds stated in subdivisions (1) and (2) of said motion.

Complainant's showing of facts was sufficient not only to justify but to require a finding that the rate in question was too low and confiscatory. The decree dismissing the bill rests solely upon the hold-

ing of the court that complainant is bound by contract to furnish gas during the 30 year life of the contract at the ordinance rate whether compensatory or not.

#### SPECIFICATIONS OF ERROR.

1. It was error for the District Court to hold that the defendant city of St. Cloud had the power to enter into the contract providing for the maximum rate for gas as contained in Section 6 of Ordinance No. 160 of the city council of the city of St. Cloud, being the ordinance described and set forth in the bill of complaint and answer herein.
2. It was error for the District Court to hold that there was in fact a contract made between the said defendant city of St. Cloud and plaintiff's predecessor mentioned in the bill of complaint and answer herein, as to rates for gas by the passage and acceptance of said Ordinance No. 160.
3. It was error for the District Court by its order to deny plaintiff's motion for a preliminary injunction against the defendant, its commission and officers, restraining them from in any manner interfering with the plaintiff in raising the rate to be charged for fuel gas in the city of St. Cloud to the sum of three and 39/100 dollars (\$3.39) per thousand cubic feet, or from instituting any suit against plaintiff to interfere with it in putting into effect said rate or from attempting to force plaintiff to sell fuel gas at the rate prescribed in the ordinance set forth in the bill of complaint.

4. It was error for the District Court by its order to grant defendant's motion to dismiss the bill of complaint for want of equity.
5. It was error for the District Court by its final decree to dismiss plaintiff's bill of complaint for want of equity.
6. It was error for the District Court by its final decree to deny plaintiff's motion for said preliminary injunction.

#### ARGUMENT.

##### THE CITY OF ST. CLOUD HAD NO POWER UNDER ITS CHARTER TO MAKE AN IRREVOCABLE AND INVIO-LABLE CONTRACT COVERING A TERM OF YEARS WITH RESPECT TO GAS RATES.

The rights, privileges and franchises granted by the ordinance set forth in the bill expire on the 1st day of December, 1935 (p. 3). The ordinance was approved December 9, 1905 (p. 5). The ordinance term then was for practically thirty years.

At the outset it is to be noted that the defendant's charter did not confer upon it power to "agree" as to rates or to "make any agreement" respecting rates, but the grant was "that the common council shall have authority to regulate and prescribe the fees and rates and charges of any and all companies hereinbefore mentioned" (p. 20).

Section 6 of the ordinance contains the provision with respect to rates and reads as follows:

"The grantee is hereby authorized to sell illuminating gas when the works therefor shall

have been completed, of a standard of fourteen candle power, at the price of not to exceed one and 85/100 dollars (\$1.85) per thousand cubic feet and fuel gas at a rate of not to exceed one and 35/100 dollars (\$1.35) per thousand cubic feet, and the grantee shall be at liberty to cut off the supply from any person failing or refusing to pay for gas furnished for a period of thirty days."

The learned judge who disposed of the case in the court below ruled that the common council of the city of St. Cloud had the power to prescribe maximum rates for the entire term of the ordinance and "there is a valid and subsisting contract between the city and the plaintiff company governing the matter of maximum rate for fuel gas, and since there is no showing that the contract was not fairly entered into, or any fraud or misrepresentation, that a court of equity cannot grant the relief asked for plaintiff" (p. 161).

This appeal challenges that ruling.

*The surrender, by contract, of a power of government, is a very grave act, and the surrender itself, as well as the authority to make it must clearly and unmistakably appear. Specific authority is required.*

*Home Telephone Co. v. City of Los Angeles*, 211 U. S. 265, was an appeal from the Circuit Court of the United States for the Southern District of California, sustaining a demurrer to the bill in a suit to restrain the enforcement of municipal ordinances fixing telephone rates. The ordinances complained of were enacted by virtue of the powers

contained in the city charter of Los Angeles, which among other things conferred upon the council the power "to regulate telephone service and the use of telephones within the city, and to fix and determine the charges for telephones and telephone service and connections." The company insisted that the city had contracted with it that it might maintain the charges for service at a specified standard and that as the rates prescribed in the ordinances complained of were less than that standard, the ordinances impaired the obligation of the contract, in violation of the Constitution of the United States. The court said:

"Two questions obviously arise here. Did the city council have the power to enter into a contract fixing, unalterably, during the term of the franchise, charges for telephone service, and disabling itself from exercising the charter power of regulation? If so, was such a contract in fact made?"

The court then proceeded to answer the first question in the negative and said:

"The first of these two questions calls for earlier consideration, for it is needless to consider whether a contract in fact was made until it is determined whether the authority to make the contract was vested in the city. The surrender, by contract, of a power of government, though in certain well-defined cases it may be made by legislative authority, is a very grave act, and the surrender itself, as well as the authority to make it, must be closely scrutinized. No other body than the supreme legislature (in this case, the legislature of the state), has the authority to make such a sur-

render, unless the authority is clearly delegated to it by the supreme legislature. The general powers of a municipality or of any other political subdivision of the state are not sufficient. Specific authority for that purpose is required. This proposition is sustained by all the decisions of this court, which will be referred to hereafter, and we need not delay further upon this point (p. 273).

It has been settled by this court that the state may authorize one of its municipal corporations to establish by an inviolable contract the rates to be charged by a public service corporation (or natural persons) for a definite term, not grossly unreasonable in point of time, and that the effect of such a contract is to suspend, during the life of the contract, the governmental power of fixing and regulating the rates. *Detroit v. Detroit Citizens' St. Ry. Co.*, 184 U. S. 368, 382; *Vicksburg v. Vicksburg Water Works Co.*, 206 U. S. 496, 508. But for the very reason that such a contract has the effect of extinguishing *pro tanto* an undoubted power of government, both its existence and the authority to make it must clearly and unmistakably appear, and all doubts must be resolved in favor of the continuance of the power."

The court then proceeds to quote the provisions of the charter of the city of Los Angeles, and said:

"The charter gave to the council the power 'by ordinance \* \* \* to regulate telephone service and the use of telephones within the city, \* \* \* and to fix and determine the charges for telephones and telephone service and connections.' This is an ample authority to exercise the governmental power of regulating charges, but it is no authority to enter into a contract to abandon the governmental

power itself. It speaks in words appropriate to describe the authority to exercise the governmental power, but entirely unfitted to describe the authority to contract. It authorizes command, but not agreement. Doubtless, an agreement as to rates might be authorized by the legislature to be made by ordinance. But the ordinance here described was not an ordinance to agree upon the charges, but an ordinance 'to fix and determine the charges.' It authorizes the exercise of the governmental power and nothing else. We find no other provision in the charter which by any possibility can be held to authorize a contract upon this important and vital subject. Those relied on for that purpose are printed in the margin" (p. 274).

The court also said:

"It is urged that though authority to contract for the maintenance of rates is not expressed in the act, it is necessarily implied from these provisions. But we are of the opinion that there is no such necessary implication, even if anything less than a clear and affirmative expression would be sufficient foundation upon which to rest an authority of this nature. The decisions of this court, upon which the appellant relies, where a contract of this kind was found and enforced, all show unmistakably legislative authority to enter into the contract. In *Los Angeles v. Los Angeles City Water Co.*, 177 U. S. 558, 44 L. ed. 886, 20 Sup. Ct. Rep. 736, the contract was in specific terms ratified and confirmed by the legislature. In *Detroit v. Detroit Citizens' Street R. Co.*, 184 U. S. 368, 46 L. ed. 592, 22 Sup. Ct. Rep. 410, the contract was made in obedience to an act of the legislature that the rates should be 'established by agreement be-

tween said company and the corporate authorities.' The opinion of the court, after saying (p. 382), 'it may be conceded that clear authority from the legislature is needed to enable the city to make a contract or agreement like the ordinances in question, including rates of fare,' pointed out (p. 386) that 'it was made matter of agreement by the express command of the legislature.' In *Cleveland v. Cleveland City R. Co.*, 194 U. S. 517, 48 L. ed. 1102, 24 Sup. Ct. Rep. 756, the legislative authority conferred upon the municipality was described in the opinion of the court (p. 534) as 'comprehensive power to contract with street railway companies in respect to the terms and conditions upon which such roads might be constructed, operated, extended, and consolidated.' In *Cleveland v. Cleveland Electric R. Co.*, 201 U. S. 529, 50 L. ed. 854, 26 Sup. Ct. Rep. 513, precisely the same authority appeared. In *Vicksburg v. Vicksburg Waterworks Co.*, 206 U. S. 496, 51 L. ed. 1155, 27 Sup. Ct. Rep. 762, the court said (p. 508): 'The grant of legislative power upon its face is unrestricted, and authorizes the city "to provide for the erection and maintenance of a system of waterworks to supply said city with water, and to that end to contract with a party or parties who shall build and operate waterworks." ' Moreover, in this case the construction of the Supreme Court of Mississippi of its own statutes was followed. On the other hand, it was held in *Freeport Water Co. v. Freeport*, 180 U. S. 587, 45 L. ed. 679, 21 Sup. Ct. Rep. 493, that two acts of the legislature, passed on successive days, authorizing municipalities to 'contract for a supply of water for public use for a period not exceeding thirty years,' and to authorize private persons to construct waterworks 'and maintain the same

at such rates as may be fixed by ordinance, and for a period not exceeding thirty years,' did not confer an authority upon the municipality to contract that the water company should be exempt from the exercise of the governmental power to regulate rates. In this case, too, the construction of the highest court of the state was followed. See *Rogers Park Water Co. v. Fergus, supra*. All these cases agree that the legislative authority to the municipality to make the contract must clearly and unmistakably appear. It does not so appear in the case at bar. The appellant has failed to show that the city had legislative authority to make a contract of exemption from the exercise of the power of regulation conferred in the charter. It therefore becomes unnecessary to consider whether such a contract in fact was made. The appellant's contention, that there was a violation of the obligation of its contract, must therefore be denied" (p. 276).

In *San Antonio Public Service Co. v. City of San Antonio*, 257 Fed. 467, it appeared that the city on March 28, 1918, passed an ordinance prohibiting any public utility company from raising its rates without first obtaining the consent of the city so to do. The company thereafter sought consent to raise its fare to six cents per passenger which was denied by the city in October, 1918, by an ordinance prohibiting a fare charge in excess of five cents, and imposed a penalty of misdemeanor by fine and forfeiture of franchise right for any violation.

Thereupon, the company filed the bill alleging that the enforcement of the ordinance prevented

it from increasing its rates and forced it to dedicate its property to public use, depriving it thereof without due process of law, in violation of the Constitution of the United States.

The prayer of the bill, among other things, was that the city be enjoined from carrying into effect the provisions of the two last mentioned ordinances. The city moved to dismiss the bill because it appeared on the face thereof that the complainant as successor to the San Antonio Traction Company was obligated to transport passengers for a five cent fare and that such ordinance constituted, in effect, a valid contract between the company and the city, and hence, that the city in refusing to permit the company to raise its fare could not be a taking of its property without due process of law. The ordinance under consideration provided:

“Said street car companies shall charge five cents fare for one continuous ride over any of their lines, with one transfer to or from either line to the other.”

The charter provision in effect at the time this ordinance was granted gives power “exclusively to prevent, control and regulate everything connected with city railroads and to make such rules and regulations for the same as the city council may deem necessary.” The court said:

“The power to ‘regulate everything connected with city railroads’ thus unrestricted would include authority to contract for and fix rates, were it not for the bar interposed by the provisions of Section 17 of the Bill of Rights of the Constitution of 1876, declaring that no ir-

revocable grant of special privilege or immunity be made, but should be subject to legislative control. The grant of a right to a city railroad to charge a fixed sum as a passenger fare during the life of its franchise is an irrevocable grant of special privilege expressly prohibited by the Constitution."

The court also held that there was no contract created by the ordinance of 1899 under the rule established in *Home Telephone Co. v. Los Angeles*.

The motion to dismiss was overruled.

After the entry of the final decree the case was appealed to this court (*City of San Antonio, et al., v. San Antonio Public Service Co.*, decided April 11, 1921). —————U. S.—————

It appears from the opinion delivered by the late chief justice that after the motion to dismiss was overruled, the city answered:

"reiterating the grounds of its previous challenge to the jurisdiction and asserting that the franchise ordinance rate was based upon a contract resulting from that ordinance and from the action taken at the time and in furtherance of the consolidation."

It appears, also, that the case was referred to a master to report on the facts and the law. The conclusion of the master with respect to the facts was,

"The rate prescribed by the ordinance is insufficient, because of the changed conditions since the rate was fixed twenty years ago, to enable the company to earn a fair return; but I have reached the conclusion that to admit the contention of the company would be for

the court to exercise a power it does not possess; a rate, reasonable when fixed, does not become unreasonable, from the judicial point of view, because of changed conditions."

It appears still further from the opinion that:

"no exception whatever to the report was made by the city, and the case therefore went to the court upon the admitted confiscatory character of the rate, upon the question of contract and upon the power of the court, if no such contract existed, to restrain the confiscation which would result from giving effect to the rate. Adhering to its previous ruling the court declared that it had jurisdiction to prevent the admitted confiscation which would result from the five cents rate. Concluding, however, that as the court was not a primary rate-making authority it would not fix a reasonable rate to replace the five cents rate the enforcement of which would be enjoined and expressing the hope that the parties might agree upon such a rate, it announced that it would postpone shaping the final decree for that purpose.

Some weeks afterward the final decree was entered. It enjoined the city from interfering with the complainant in substituting a seven cents fare for the five cents fare and besides enjoined the city from enforcing the various ordinances complained of in the bill prohibiting and punishing the charging of a higher rate than five cents. The decree reserved, however, the right to the city to ask relief whenever because of a change in conditions the five cents fare should cease to be confiscatory. In addition, the enforcement of the city ordinance imposing the half fare rate for school children was enjoined, although the continued enforcement of the state half-fare law, which

had been upheld in the Altgelt case, was expressly declared not to be restrained. On the direct appeal of the city because of the constitutional question involved, we are called upon, as at the outset stated, to determine whether error was committed in the decree thus rendered.

That in view of the admitted fact of confiscation the court had power to deal with the subject, we are of opinion is too clear for anything but statement. And we think it is equally clear that as the right to regulate gave no power whatever to violate the constitution by enforcing a confiscatory rate, a result which could only be sustained as a consequence of the duty to pay such rate arising from the obligations of a contract, it follows that the solitary question to be considered is whether a contract existed empowering the city to enforce the confiscatory rate.

Primarily the answer to that question must depend upon whether the ordinance of 1899 fixing the five cents rate was a contract. That it was not and could not be, we are of opinion is the necessary result of the provision of section 17, Article I, of the state constitution, existing in 1899, prohibiting 'any irrevocable or uncontrollable grant of special privileges,' etc., when considered in the light of the irrevocable and uncontrollable elements which must necessarily inhere in the ordinance of 1899 to give it the contract consequence relied upon. Indeed this result is persuasively established by the ruling in the Altgelt case, to the effect that if the contract right were conceded there would, in view of the constitutional restriction, be such an inevitable conflict between that right and the dominant power to regulate as to render the contract right inoperative and therefore to

cause it to perish from the mere fact of admitting its conflict with the authority to regulate."

Finally, the court declared:

"The fact is, that all the contentions of the city as to implication of contract as to the 1899 rates but illustrate the plainly erroneous theory upon which the entire argument for the city proceeds, that is, that limitations by contract upon the power of government to regulate the rates to be charged by a public service corporation are to be implied for the purpose of sustaining the confiscation of private property."

*Southern Electric Co. v. City of Chariton, Iowa, Electric Co. v. City of Fairfield, Muscatine Lighting Co. v. City of Muscatine, — U. S. —,* decided April 11, 1921, were three suits begun against the cities with the object of preventing the enforcement of the maximum rates specified in certain ordinances, on the ground that such rates were so unreasonably low that their continued enforcement would deprive the corporations of remuneration for the services by them being performed and in fact, if enforced, would result in the confiscation of their property in violation of the due process of the 14th Amendment to the Constitution of the United States. In the three cases the court below granted a temporary injunction restraining the enforcement of the maximum rates and allowed an order permitting, pending the suits, a higher charge.

The cases were submitted upon the pleadings and without the taking of testimony upon issues which

presented the contention, that the ordinances were contracts and therefore the maximum rates which they fixed were susceptible of continued enforcement against the corporations although their operation would be confiscatory. Subsequently the pleadings were so amended as to directly present, separately from the other issues in the case, the right of the cities to enforce the ordinance rates in consequence of the contracts, without reference to whether such rates were in and of themselves confiscatory. Upon its opinion as to the existence of contracts and the power to make them as previously stated, the court entered decrees enforcing the ordinance rates which came before this court for review because of the constitutional question involved.

The court said :

"Two propositions are indisputable: (a) That although the governmental agencies having authority to deal with the subject may fix and enforce reasonable rates to be paid public utility corporations for the services by them rendered, that power does not include the right to fix rates which are so low as to be confiscatory of the property of such corporations (citing cases); and (b) that where, however, the public service corporations and the governmental agencies dealing with them have power to contract as to rates, and exert that power by fixing by contract rates to govern during a particular time, the enforcement of such rates is controlled by the obligation resulting from the contract and therefore the question of whether such rates are confiscatory becomes immaterial (citing cases)."

It follows that as the rates here involved

are conceded to be confiscatory they cannot be enforced unless they are secured by a contract obligation. The existence of a binding contract as to the rates upon which the lower court based its conclusion is, therefore, the single issue upon which the controversy depends. Its solution turns, first, upon the question of the power of the parties to contract on the subject, and second, if they had such power, whether they exercised it."

The court referred to the statute of Iowa forbidding any abridgment of the right to regulate and fix charges of service corporations, and after referring to the decisions of the Supreme Court of the state of Iowa to the effect that the fixing of maximum rates in a franchise ordinance is not a contract, said:

"The total want of power of the municipalities here in question to contract for rates, which is thus established, and the state public policy upon which the prohibition against the existence of such authority rests, absolutely exclude the existence of the right to enforce, as the result of the obligation of a contract, the concededly confiscatory rates which are involved, and therefore conclusively demonstrate the error committed below in enforcing such rates upon the theory of the existence of contract. And, indeed the necessity for this conclusion becomes doubly manifest when it is borne in mind that the right here asserted to contract in derogation of the state law and of the rule of public policy announced by the court of last resort of the state is urged by municipal corporations whose every power depends upon the state law" (citing cases).

See also *City and County of Denks v. Stenger*, 277 Fed. 865.

*Milwaukee Electric Ry. & L. Co. v. Railroad Commission*, 153 Wis. 592, was an action to enjoin the commission from enforcing an order against the company whereby the right of the railway company to charge fares upon its railway system had been reduced below what it was contended had been previously fixed by an ordinance of the city of Milwaukee which it was alleged upon acceptance constituted an irrevocable contract between the company and the city.

The statute under which the original ordinances were authorized provided with respect to street railways as follows:

"Any municipal corporation or county may grant to any such corporation, under whatever law formed, or to any person who has the right to construct, maintain and operate street railways, the use, upon such terms as the proper authorities shall determine, of any streets, parkways or bridges within its limits for the purpose of laying single or double tracks and running cars thereon for the carriage of freight and passengers \* \* \*. Every such road shall be constructed upon the most approved plan and be subject to such reasonable rules and regulations and the payment of such license fees as the proper municipal authorities may by ordinance from time to time prescribe. Any such grants heretofore made shall not be invalid by reason of any want of power in such municipal corporation to grant, or any such railway corporation or person to take the same; but in such respects are hereby confirmed" (see *Milwaukee Electric R. & L. Co. v. Railroad Com.*, 238 U. S. 174-179).

The chief justice of the Supreme Court of Wisconsin in his opinion said:

"There is in fact but a single question, and that is whether the ordinances referred to in the statement of facts, so far as they specify the rates of fare which may be charged, constitute contracts which are protected by the state and federal Constitutions from impairment."

The chief justice further said:

"In construing the meaning of the statute in question, certain fundamental considerations must be kept clearly in mind if we would reach correct and just conclusions, and some of the more important of these considerations will first be stated. The power to fix rates and tolls to be charged by public utilities is one of the attributes of sovereignty. With us this great power is vested in the legislature, and when the legislature speaks upon the subject its voice is controlling and supreme, unless indeed some constitutional guaranty is invaded."

The chief justice further said:

"Clearly the legislature should not part with the power, even for a limited time, except upon the most potent and convincing considerations.

No presumption can be indulged that it has parted with the power, nor will doubtful words be construed as having that effect. He who asserts that the state has surrendered any part of its sovereign power even temporarily in his favor must prove the fact by the most convincing evidence. The presumptions, if any there be, must run the other way. If it were to be admitted for the purposes of the argument that

the legislature could by express language authorize municipal authorities to make contracts with public utilities fixing rates which should exist for definite periods in the future and be beyond legislative control during those periods (a proposition concerning which we intimate no opinion), the question here is whether such express language is to be found in Section 1862.

The section does not contain the word 'contract,' nor any words of similar import, except that the provision relating to the motive power provides that the cars shall be propelled by animals, or 'such other power as shall be agreed on.' The word 'grant' is, of course, a contract word, but the grant simply covers the right to the use of the streets; nothing else is specifically authorized to be 'granted.' This grant is to be upon 'terms'; not such terms as may be agreed on (as in the case of the motive power), but such terms as the municipal authorities 'shall determine.' Here clearly is language appropriate to the exercise of power by the municipal authorities, rather than to the making of a contract; to the imposition of commands by a superior power rather than to the reaching of a result by negotiation and agreement between equals.

Assuming that under this language a city might make a contract with a public utility, fixing rates or tolls for a definite period, which would bind the city itself and prevent any change of rates by the city authorities during the contract period, the question still remains whether the section can be construed as giving the city authorities any power to bargain away the sovereign right of the state to regulate fares and tolls and lower them, if found to be excessive. If this question were a new one in this state, we should entertain no doubt

that it should be answered in the negative, but we do not regard it as new."

It was finally held that the statute did not empower the city to make any contract with the company fixing rates of fare which could not be changed by legislature or other legislative agency, and hence the ordinance which the company claimed to be irrevocable was not a contract protected from impairment by the state and federal Constitutions.

This case came before this court on a writ of error to the Supreme Court of the state of Wisconsin, 238 U. S. 174. The decree of the state court was affirmed and Mr. Justice Day, speaking for this court, said:

"The fixing of rates which may be charged by public service corporations, of the character here involved, is a legislative function of the state, and while the right to make contracts which shall prevent the state during a given period from exercising this important power has been recognized and approved by judicial decisions, it has been uniformly held in this court that the renunciation of a sovereign right of this character must be evidenced by terms so clear and unequivocal as to permit of no doubt as to their proper construction. This proposition has been so frequently declared by decisions of this court as to render unnecessary any reference to the many cases in which the doctrine has been affirmed" (p. 180).

*Knorrville Gas Co. v. City of Knorrville*, 261 Fed. 283, was an action in which the company sought relief to prevent the city from interfering with the

company's exaction of an increase in the price of gas. It appears that the company was organized in March, 1903, to construct and operate gas works in the city of Knoxville. On the 8th day of September, 1903, the city adopted an ordinance in terms permitting the company the right to construct and operate gas works within the city for a period of fifty years. The ordinance required the company "to furnish gas of a given candle power to consumers within the city at a price not more than \$1.10 per thousand cubic feet, less ten cents per thousand if paid by the 10th of each succeeding month of supply." The company until the filing of the bill in the case conformed its rates and charges to the maximum limit prescribed. In 1917, the date not appearing, the company petitioned the city to be allowed an increased rate for its gas. On March 5, 1918, the city adopted an ordinance forbidding under penalty any person or corporation supplying any article of public utility "to demand, accept or charge any unlawful rate or charge for a public utility article or service rendered or required to be rendered under its contract of franchise with the city of Knoxville to a consumer or patron." In the bill it was charged that owing to the increased costs brought about by the world war the rates fixed in the ordinance were inadequate and not compensatory and to force the company to continue to sell its gas at the ordinance rates would result in a taking of its property without due process of law, in violation of the Fourteenth Amendment. The bill was dismissed

in the court below. Warrington, circuit judge, after stating the facts, said:

"The controlling question is whether in 1903 the city of Knoxville possessed the power by contract irrevocably to fix the maximum price of gas for a term of 50 years. If the city in reality had the power, the decree must be affirmed; for, in the first place, the rights and obligations in terms created under the ordinances of September, 1903, will not expire for over 30 years, and, in the next place, despite the complaint made of the world war conditions, it is not shown that performance of the ordinance provisions, taking all the years in contemplation together, 'will prove unremunerative.' *Columbus Railway, Power & Light Co. v. City of Columbus*, 249 U. S. 399, 414, 39 Sup. Ct. 349, 354 (63 L. Ed. 669), opinion by Mr. Justice Day.

We assume that the passage of the ordinances by the city and their acceptance by the company in 1903 amounted to a binding contract between the parties as to all matters falling clearly within their respective corporate powers. In view, however, of the issue touching the price-fixing feature, it is necessary to consider whether the city could by contract of substantial duration and providing a maximum price for the supply of gas, bind the gas company, on the one hand, to accept this price in the face of intervening changes in conditions fairly calling for distinct increase in price, and commit the inhabitants of Knoxville and the municipality itself, on the other hand, to pay the price (for such quantities of gas as they might use) in spite of conditions obviously justifying material reduction in price. This is what the power claimed means; and the far-reaching consequences that well

might attend its execution, as respects both the consumer and the company, certainly demand the closest scrutiny into the disputed existence of the power.

The power to establish prices to be charged by public service corporations, whether it is to be exercised by regulation or by contract, resides primarily in the state—here, the state of Tennessee. Admittedly it is capable of being delegated by the legislative branch of a state to its municipalities. Efforts to define the power with precision, and to differentiate it from other municipal powers, have often been made under questions of whether it had in reality been delegated and rightly exercised; but they have failed to establish any rule of uniform acceptance and application. It is enough for present purposes to say that the character of the power is governmental, and that the consequent importance of conserving it is manifest; indeed, in the absence of specific provision to the contrary, it is to be interpreted as a power continuing in nature and incapable of being bartered away. Can it be safely said, then, that the state of Tennessee has both surrendered part of its own power and, in effect, authorized the city of Knoxville to exercise it by contract? The settled federal rule in respect of both these features is exacting, and need not be misunderstood; it requires that the intent of the state so to give up a portion of its power must appear in explicit and convincing terms—in plain words—and that doubtful expressions shall be resolved in favor of the state."

The court further said:

"No legislative provision has come to our attention which expressly grants this power

to the city of Knoxville specially or to the municipalities generally. What is claimed is that, in virtue of certain charter and statutory provisions, the city was invested with power to control the streets, to grant franchises therein to public utility corporations, and to give consent to occupy the streets for gas purposes, either through original construction of a plant, or acquisition and use of an existing plant, upon such terms and conditions (not violative of any law) as it might impose, and that the right thus to make or refuse a grant, or to give or withhold consent, necessarily implies power to prescribe by ordinance as a condition, among others, of the grant or consent, a maximum price for a distinct term, which price and term upon the company's acceptance of the ordinance become part of a binding contract. It will be convenient, even at the expense of space, to set out the apposite portions of the statutes upon which the insistence of counsel is based; accordingly they are shown in the margin. It is to be observed of these provisions that, although the general assembly itself expressly authorized chartered gas companies to charge a reasonable price for gas, not exceeding the price allowed by existing charters or a maximum price therein definitely named, yet nothing distinctly reciprocal to this was vested in the cities. Authority to make prices by contract, or even by way of regulation, touching the supply of gas, is nowhere expressed among the municipal powers. Thus the claim of power in the city to agree upon a price for gas supplied throughout the life of the ordinances of 1903, must at last rest on the right created in the city in general language to impose terms and conditions of its consent to use the highways, rather than upon

language specifically authorizing it either to regulate prices or to agree upon a price. The effect of such a claim is to ask that there be read into the statutes language which the legislature did not see fit to enact."

The result was that the court held that neither the Knoxville charter nor any statute of Tennessee delegated to the city the power of the state to regulate rates to be charged by a public utility and that hence a franchise contract entered into between the complainant and the city fixing the rate could not in that respect be enforced by the city when by reason of changed conditions the rate fixed was not compensatory.

In *Central Power Co. v. City of Kearney*, 274 Fed. 253, the United States Circuit Court of Appeals for the Eighth Circuit held that assuming under a certain statute of Nebraska a city is authorized to contract with an electric light and power company concerning the rates to be charged, it could not make a contract precluding it from increasing or reducing the rates during the life of the contract in view of another section of the Nebraska statutes authorizing cities to regulate such rates and providing that such power shall not be abridged by ordinance, resolution or contract. It was further held as a contract between a Nebraska city and an electric light and power company providing for the construction of an electric light and power system and fixing maximum rates to be charged for twenty-five years was beyond the city's powers so far as it prohibited changes of rates

during the life of the contract, its provisions were unenforceable against the company for want of mutuality, and did not prevent an increase of rates.

In the *City of Moorhead* case (255 Fed. 920), cited by the learned judge in his memorandum, the court assumed that the city had the power to contract with respect to rates, for it said:

"When cities are expressly vested with power to enter into contracts as to rates, it is now established by repeated decisions of the Supreme Court that such contracts are binding upon the city even though the public utility company may make extortionate profits therefrom" (p. 922).

No question as to the existence of the power of the city to make the contract as to rates was passed upon by Judge Amidon or involved in that case.

*It has always been the policy of the state of Minnesota for the state to reserve at all times the power to fix compensation to be charged by public service corporations for their services.*

Section 6137, General Statutes of Minnesota 1913, reads as follows:

"The state shall at all times have the right to supervise and regulate the business methods and management of any such corporation (that is public service corporations) and from time to time to fix the compensation which it may charge or receive for its services; and every such corporation obtaining a franchise from a city or village shall be subject to such conditions and restrictions as from time to time may be imposed upon it by such municipality."

This provision is first found in Chapter 74 of

the Session Laws of Minnesota for the year 1893 and has been continuously on the statute books of the state ever since that date.

There is nothing in the Constitution of Minnesota permitting villages and cities to adopt home rule charters (Sec. 36, Art. 4, Const. Minn.) nor in the Enabling Act (Gen. Stat. Minn. 1913, Secs. 1343-1353) indicating any intention on the part of the legislature to surrender its power reserved by said Section 6137 to fix the rates to be charged by public service corporations.

Section 1347, Gen. Stat. Minn. 1913, being a part of the Enabling Act respecting the adoption of home rule charters, reads as follows:

"Such proposed charter may provide for regulating and controlling the exercise of privileges and franchises in or upon the streets and other public places of the city, whether granted by the city or village, by the legislature or any other authority; but no perpetual franchise or privilege shall ever be created, nor shall any exclusive franchise or privilege be granted, unless the proposed grant be first submitted to the voters of the city or village, and be approved by a majority of those voting thereon, nor in such case for a period of more than twenty-five years."

This power so conferred upon cities and villages to regulate and control the exercise of privileges and franchises in or upon the streets and other public places of the city or village in no way deprives the state of the power reserved by Section 6137 to fix rates.

ANY IRREVOCABLE CONTRACT BETWEEN THE PARTIES TO THIS CAUSE FIXING GAS RATES FOR A TERM OF YEARS VIOLATES SECTION 33 OF ARTICLE IV OF THE CONSTITUTION OF THE STATE OF MINNESOTA.

Section 33 of Article IV of the Constitution of Minnesota, adopted November 8, 1881, and amended November 8, 1892, provides:

"The legislature shall pass no local or special law \* \* \* granting to any corporation, association or individual any special or exclusive privilege, immunity or franchise whatever."

The language of the amendment of 1881 is this:

"The legislature is prohibited from enacting any special or private laws in the following cases \* \* \*.

10th. For granting to any individual, association or corporation, except municipal, any special exclusive privilege, immunity or franchise whatever."

See General Laws Minn., pp. 21, 22.

The record in this case, as hereinbefore shown, discloses that the charter of the defendant in force at the time the ordinance was passed and approved was created by an act of the legislature approved April 13, 1889, Sp. Laws Minn. 1889, Ch. 6.

It is axiomatic that the legislature could not confer upon the city of St. Cloud in 1889 any greater legislative power than it possessed itself; and that

whatever powers were conferred were at all times necessarily subject to all constitutional limitations.

*Town of Woodbury v. Iowa Ry. & Light Co.,*  
178 N. W. 549, 551.

Assuming for the purposes of the argument that defendant's charter was broad enough to confer upon the council the power to grant to complainant's predecessor an irrevocable contract to fix a specified rate for gas for a period of thirty years, the question is, could the legislature do that in view of the constitutional limitation referred to? We think not. We respectfully urge that it was so held in the San Antonio case *supra*.

In the District Court, Judge West said:

"The power to 'regulate everything connected with city railroads' thus unrestricted would include authority to contract for and fix rates, were it not for the bar interposed by the provisions of Section 17 of the Bill of Rights of the Constitution of 1876, declaring that no irrevocable grant of special privilege or immunity could be made, but should be subject to legislative control. The grant of a right to a city railroad to charge a fixed sum as a passenger fare during the life of its franchise is an irrevocable grant of special privilege, expressly prohibited by the Constitution."

257 Fed. 469.

Upon appeal to this court, the late Chief Justice in considering the question as to whether the ordinance of 1889 fixing the five cent rate was a contract, said:

"That it was not and could not be, we are

of opinion is the necessary result of the provision of Section 17, Article I, of the State Constitution, existing in 1899, prohibiting 'any irrevocable or uncontrollable grant of special privileges,' etc., when considered in the light of the irrevocable and uncontrollable elements which must necessarily inhere in the ordinance of 1899 to give it the contract consequence relied upon. Indeed this result is persuasively established by the ruling in the Altgelt case, to the effect that if the contract right were conceded there would, in view of the constitutional restriction, be such an inevitable conflict between that right and the dominant power to regulate as to render the contract right inoperative and therefore to cause it to perish from the mere fact of admitting its conflict with the authority to regulate."

*City of San Antonio v. San Antonio Public Service Co.*, — U. S. —.

*The power of a municipality to fix the rates to be charged by a public service corporation is embraced within its governmental and legislative powers as contradistinguished from its business or proprietary powers.*

3 *Dillon Mun. Corp.* (5th Ed.), Sec. 1325.

*Home Telephone Co. v. City of Los Angeles*,  
211 U. S. 265.

*Rogers Park Water Co. v. Fergus*, 180 U. S.  
624.

*Knoxville Gas Co. v. City of Knoxville*, 261  
Fed. 283.

*Milwaukee Electric Railway & Light Co. v.  
Railroad Com.*, 238 U. S. 174.

THE CASES CITED BY THE LEARNED DISTRICT JUDGE TO SUSTAIN HIS CONCLUSION THAT THE RATES TO BE CHARGED FOR ALL GAS AUTHORIZED TO BE SOLD BY THE COMPLAINANT ARE FIXED FOR THE LIFE OF THE ORDINANCE ARE NOT IN OUR JUDGMENT IN POINT. NO QUESTION OF LEGISLATIVE OR GOVERNMENTAL POWER—ITS EXERCISE OR SUR-RENDER—WAS INVOLVED IN ANY OF THEM. EACH INVOLVED ONLY THE PURCHASE BY THE CITY ITSELF OF A COMMODITY TO BE USED BY IT FOR ITS OWN BENEFICIAL PURPOSE.

In *Flynn v. Little Falls Electric & Water Co.*, 74 Minn. 180 (cited by the District Judge) it was held that the common council of the city of Little Falls had authority to make a time contract with the Water Company to pay an agreed price for a specified number of hydrants to supply water for fire protection, provided the length of time the contract was to run was reasonable; and that a thirty-year period was an unreasonable length of time and that a tax-payer might maintain an action to restrain the common council from paying out money on such void contract.

In *Fergus Falls Water Co. v. City of Fergus Falls*, 65 Fed. 586 (a case cited by the District Judge), it was held that where a city with a population of five thousand and an assessed valuation of

property of two and a quarter million dollars contracts with a person giving him the exclusive privilege of laying water mains in the city for thirty years and providing that he shall furnish the city with fifty fire hydrants for a specified rental per year for the thirty years with a stipulation that, at the end of ten years, it may, at its option, buy the waterworks, the contract will not after the city has enjoyed the benefit of it for over ten years be held so unreasonably oppressive or contrary to public policy as to be void; and that where power has been given a city by its charter to contract for waterworks it has power to make necessary and proper arrangements to provide for payment of the same.

In *Anoka Water Works, etc., Co. v. City of Anoka*, 109 Fed. 580 (a case cited by the District Judge), it was held that where a city has power under its charter to provide for furnishing water and light to the city and its inhabitants and to control the erection of works for such purposes, has the power to contract for the furnishing of water and light by third parties and to grant the franchises and privileges necessary to carry out such contracts; and that it may agree to pay a stipulated sum to the grantees each six months for water and light for public use during a term of years, where such contracts are reasonable.

The court in its opinion, after referring to the provision in the city charter authorizing it to provide for and conduct water into and through the streets, alleys and public grounds of the city and to

provide for and control the erection of waterworks for the supply of water for the city said:

"Under these powers, and in the performance of the duties incident to such powers, the city might either construct waterworks \* \* \* and operate the same, or it might contract for the supply of water and light; granting to the contractor such franchises as might be necessary or convenient for the construction and operation of the works for the supply of water and light (citing cases). The admitted facts show that these works were necessary, and were generally desired by the inhabitants of the city, when contracted for, as conducive to their health and comfort" (p. 582).

The learned judge in his memorandum (pp. 159-160) cited the case of *Reed v. City of Anoka*, 85 Minn. 294, and quoted at length from the opinion in that case. He then said (p. 160):

"The parallelism between the Reed case and the case at bar is striking. The charter provisions are essentially the same as to the powers of the cities. The ordinance provisions are essentially the same as to the grant of franchises, as to a long time period and as to a maximum charge for service. The Reed case in my judgment is conclusive as to the construction to be placed upon the charter of the defendant city and its power to make the contract in question; also as to the construction to be placed upon the maximum rate provision contained in the contractual franchise ordinance."

We fail to see the slightest similarity between the two cases. The Reed case was an action brought by a tax-payer in his own behalf and in

behalf of others to have the franchise contracts cancelled and the city restrained from carrying them out. In its opinion the Supreme Court of Minnesota said:

"The authority under which the city acted in entering into the contracts is found in the provisions of its charter, which, among other things, confer upon the municipality, in substance: (a) Power to make and establish public pumps, wells, cisterns and hydrants, and to provide for and control the erection of water-works for the supply of water for the city and its inhabitants; (b) power to provide for lighting the city with electricity, gas, or other means, and to control the erection of any works for that purpose, and to grant to any corporation or person the right to occupy its streets for that purpose. There can be no doubt but that these charter provisions confer upon the municipality authority to enter into contracts with individuals for the purpose of providing itself and its inhabitants with a supply of water, and for the purpose of lighting the city. Authorities sustaining the proposition, under similar charter provisions, are numerous: *Andrews v. National Foundry & Pipe Works*, 10 C. C. A. 60, 61 Fed. 782; *Los Angeles v. Los Angeles City Water Co.*, 177 U. S. 558, 88 Fed. 720; *City v. Newport*, 84 Ky. 166; *City v. Indianapolis*, 66 Ind. 396."

The court then went on to say that the contention made was that the contracts were void on their face because and for the reason that they cover a term of thirty-one years and definitely and finally fix and determine the rates of compensation to be paid the grantees for the full period and thus in effect barter and contract away legis-

lative functions of the municipality. An examination of the case will show that the question involved was as to the power of the city to contract for the period mentioned, thirty-one years, for a certain number of hydrants at a rate of \$64.00 per year. The Supreme Court of Minnesota then said:

"The authorities are very uniform that contracts of this nature are not within the legislative or governmental prerogatives of the municipality, *but rather within its proprietary or business powers*. *Their purpose is not to govern the inhabitants*, but to secure for them and for itself a private benefit. *Illinois Trust & Sav. Bank Co. v. City of Arkansas City*, 22 C. C. A. 171, 76 Fed. 271; *Walla Walla City v. Walla Walla Water Co.*, 172 U. S. 1, 19 Sup. Ct. 77. It was so held in the case of *Flynn v. Little Falls E. & W. Co.*, 74 Minn. 180, 77 N. W. 38, 78 N. W. 106. While this precise point of distinction was not made in that case, it is authority for the proposition that a municipality *does not exercise its legislative functions in entering into contracts of* this kind, but only *its business or proprietary powers*, to which *the rules and principles of law applicable to contracts and transactions between individuals apply*. It would be extremely illogical to hold that such contracts could be lawfully made and entered into, provided they did not extend in duration beyond the term of office of the council by which they are made, and would tend to render the exercise of the power by municipalities practically valueless" (italics ours).

It will, therefore, be observed that the opinion in this case sustains the contention contained in

our caption that the powers involved in all of the cases cited by the learned judge did not arise under any legislative or governmental power, but under the city's business or proprietary right to make and enter into commercial contracts of purchase of water and electricity for its own use. It is to be further noted that the court in the Reed case very clearly points out the distinction between the legislative or governmental powers of a city and its business or proprietary powers.

The question presented in the cases cited by the learned judge below are thus discussed by Judge Dillon as follows:

"When a city has statutory authority to enter into contracts for a supply of water and gas for its own use and for the use of its inhabitants, the *manner* in which its statutory power shall be exercised and the terms of any contract which it may enter into, including the *number of years during which it is to continue*, rest within the *discretion* of the municipal authorities; and the courts will not review it or set it aside in the absence of fraud or an abuse or excess of authority, or unless the contract is so unreasonable, inequitable, or unfair as to justify the interference of a court on the established principles of law or equity. In the absence of charter or statute provision there is no rule of law which requires the municipal authorities to confine the exercise of their discretion in contracting for water or light to the *term of office* of the council or other officers making the contract; or to a contract for a single fiscal or calendar year. It has been said that the courts look with disfavor upon contracts involving the

payment of moneys extending over a long period of time as tending to create a monopoly and involving undue restraint of the legislative powers of the successors of municipal boards and officers. But the great weight of authority clearly recognizes the validity of such contracts when they are not *ultra vires*, and they will not be disturbed if it appears that at the time when the contract was entered into it was fair and reasonable and warranted by the necessities of the case, or was then advantageous to the municipality. The decisions do not disclose that there is any *stated term* which the courts will regard as so unreasonable as to be an unfair and unreasonable exercise of the discretionary powers of the municipality. If, however, it appears that the contract is unreasonable, inequitable, and unfair, e. g., if it be shown that at the time when the contract was made the city did not, and will not for many years to come, require the hydrants or lights called for by the contract, or that the price agreed to be paid by the city for each hydrant or light is unreasonable and exorbitant, and more than the reasonable value thereof, or that the effect of the contract is to result in appropriating to its purposes the entire present income of the city, leaving nothing for other present, or so far as can be seen, for other future needs, or that the natural effect of the contract is to create a monopoly during a long term of years, the contract so made will be regarded as an improper exercise of the power to contract conferred upon the city council, and it will be set aside by the courts." 3 *Dillon Mun. Corp.* (5th ed.), Sec. 1307. In the note to this section three of the cases cited by the learned judge in the court below are referred to, viz., *Flynn v. Little Falls Elec. & W. Co.*, 74 Minn.

180; *Reed v. Anoka*, 85 Minn. 294, and *Fergus Falls Water Co. v. Fergus Falls*, 65 Fed. 586.

To sum up on this branch of the case it is apparent that purchases by a city of water, fuel, light, power and the like to enable it to carry on and discharge its proper functions are not at all like the surrender or bartering away of legislative power to fix rates for gas to the end that charges to consumers shall not be excessive or unequal. In determining the question of *ultra vires* courts will readily infer the power of a city to make purchases of the character above referred to. On the other hand the power to surrender the sovereign power of the state to fix rates to be charged by a public utility will never be inferred. The grant by the state of that power to a city must be expressly conferred in plain, clear, unequivocal and unmistakable language. Both rules rest upon sound public policy.

UNDER SECTION 6 OF THE FRANCHISE ORDINANCE THE GRANTEE IS NOT BOUND TO FURNISH GAS AT THE RATES THEREIN SPECIFIED, NOR IS THERE ANYTHING THEREIN TO INDICATE THAT THE GRANTEE EVER SURRENDERED ITS CONSTITUTIONAL RIGHT TO HAVE JUST COMPENSATION.

(a) The language in Section 6 of the ordinance does not purport to make a contract; it is not contractual in form but is declaratory and legis-

lative in form—

"The grantee \* \* \* is authorized hereby to sell illuminating gas of a standard of fourteen candle power, at the price of not to exceed one and 85/100 dollars (\$1.85) per thousand cubic feet and fuel gas at not to exceed one and 35/100 dollars (\$1.35) per thousand cubic feet, and the grantee shall be *at liberty* to cut off the supply from any person failing or refusing to pay for gas furnished for a period of thirty days" (p. 3).

The purpose of the rate provision in Section 6 was to exercise the legislative power reserved to the city for the establishment of reasonable rates, so that "when the works therefor shall have been completed," the consumers and the company would be advised of the maximum rates permitted to be charged for gas of the new standard produced and distributed by the new plant; to bind the consumers to pay rates charged by the company up to the maximum; to free consumers and the company from danger and expenses of litigation as to reasonableness of rates charged—a question always open in the absence of authoritative regulation—and also to leave the city free to fix higher or lower rates in the proper exercise of its legislative authority, and to leave unimpaired to the company its right to have just compensation for the use of its property and for the services rendered—a right safeguarded to it by the Constitution.

That the provision of Section 6 as to rates is legislative and not contractual, is also evidenced

by the provision authorizing the company to cut off the supply of gas for non-payment of bills. As to rates, it is said, "The grantee is authorized," etc., and as to cutting off the supply it is said, "The grantee shall be at liberty to cut off the supply," etc. Probably no one will claim that the latter is contractual or that the company is bound or limited thereby to that remedy. The words with reference to rates and those with reference to cutting off the supply are substantial equivalents.

Again, the language in Section 6 as to rates does not express or imply any period of time during which the prescribed maximums shall continue to be charged. The language is, "The grantee is authorized hereby to sell illuminating gas *when the works therefor shall have been completed,*" of the specified standard, within specified maximum prices. This language merely fixes the time when the right of the company to make such charges shall commence. When the ordinance was passed the company had an old gas plant then furnishing gas. In that paragraph it bound itself until the completion of the new plant to furnish gas from the old works. Plainly, it was the purpose of the rate provision in Section 6 to prescribe maximum rates to take effect (with no provision as to duration) when the works were completed.

(b) Paragraph 5 contains a contractual provision—mark the language:

"The grantee hereby covenants and agrees that it will, prior to the first day of January, 1907, erect \* \* \* an efficient coal gas

generating plant or system of ample capacity, and *after the erection* shall manufacture and offer for sale to the city and its inhabitants coal gas of at least fourteen candle power, and in the meantime will furnish gas from the present gas works of the grantee of the standard *now* manufactured therein" (p. 3).

This section is contractual in form. The company agrees to build a new plant; after completion thereof to furnish gas of at least fourteen candle power, and in the meantime to furnish gas from the old works of the then present standard.

Manifestly, if it had been intended by the parties to contract with reference to rates for the term of the franchise, or for any other period, they would have clearly so stated in this section.

No language having any contractual purpose or effect is found in paragraph 6. The change of form is from contractual, used in Section 5, to legislative, used in Section 6. Under the city charter the council had power to provide for and control the erection of gas works. This included power to bind the company by contract to build the plant and to serve the public with gas. But there is no such charter power with respect to rates. The ordinance in harmony with the city's charter power employs language in Section 6, with respect to rates, indicating the legislative purpose to regulate and prescribe rates, not to contract with reference to them.

(c) In Section 7 it is provided:

"The rights hereby granted are *upon the*

*express condition* that the city of St. Cloud may purchase the electric and gas works of the grantee on the first day of January, 1911," etc. (p. 4).

There is no similar or equivalent language in Section 6, or elsewhere, with respect to rates. The failure to similarly provide with respect to rates is significant. It shows absence of intention to contract as to rates.

If the parties intended that the company at no time during the thirty years of life of the franchise, under no circumstances whatever, should ever charge more than \$1.35 per M. for fuel gas, we rightly would expect to find evidence of such an extraordinary purpose. But the language employed—especially when viewed in connection with the other provisions of the ordinance—is the strongest evidence that the parties had no such intention or purpose.

An inviolable constitutional right will not be deemed to have been surrendered lightly or by mere implication. The same strict rule should be applied to protect the company in its constitutional right to have just compensation for its property used and services rendered, as is usually invoked to protect the public (in cases where power to contract is given a city) against a surrender of the power to prescribe and regulate rates. The same reasons apply in both cases. Plain, unambiguous provisions are required to effect a surrender by a city of its power to regulate or to effect a surrender by a public service company of its constitu-

tional safeguard against confiscation.

It is plain that neither the city nor the company is bound by contract with respect to rates to be charged for gas. The city could not surrender its power and did not attempt to do so. It may now—within the limitations of the constitutional protection enjoyed by the company—prescribe rates higher or lower than those specified in Section 6. There is nothing in the language contained in the franchise ordinance, or in the circumstances of its enactment, which furnishes any support for the contention that the company is bound to furnish gas at the prescribed rates, if it can be shown that the same are too low and confiscatory.

**A MOTION TO DISMISS A BILL IN EQUITY  
ADmits ALL THE ALLEGATIONS OF THE  
BILL WHICH ARE WELL PLEADED.**

*Johnson v. M. & St. P. Ry. Co.*, 224 Fed. 160.

*Fordham v. Hicks*, 224 Fed. 810.

*Lowenthal v. Georgia Coast & R. R. Co.*, 233 Fed. 1010.

*Hosler v. Ireland*, 219 Fed. 490.

*San Antonio Public Service Co. v. City of San Antonio*, 257 Fed. 467.

The bill in this case clearly alleges a confiscation of complainant's gas property within the prohibition of the 14th Amendment.

The learned judge in the court below clearly so held by sustaining the jurisdiction of the court.

He said :

"Upon consideration of the allegations contained in the present complaint, I am of the opinion that questions are presented by the complaint which arise under the Fourteenth Amendment to the Federal Constitution and that those questions are not so wholly lacking in merit as to afford no basis for jurisdiction" (p. 147).

That he was impressed with the inadequacy and the non-compensatory character of complainant's gas rates is further shown by his quotation from the opinion in the Moorhead case, *supra*, where Judge Amidon said:

"The situation disclosed by the cross-bill if it is a true picture of the actual effect of the rates upon defendant's business, is such as might lead a just man in private life to modify a contract" (p. 161).

Briefly, the bill shows that complainant's gas property cost up to August 31, 1920, \$194,057.03, and that its present value is in excess of \$440,000 (p. 6).

It is specifically alleged (and the earnings are shown on pages 7 and 8 of the record) that the ordinance rates have not been adequate or sufficient to pay complainant's necessary operating expenses and yield a fair or reasonable return on the fair value of the property devoted to public use. The bill also alleges operating deficits from the year ending December 31, 1917 (p. 8). So that it is perfectly clear that the bill challenges the maximum ordinance rates as being non-compensatory and

confiscatory and in violation of the Fourteenth Amendment.

For the reasons hereinbefore given we respectfully urge that the decree of the court below should be reversed.

J. O. P. WHEELWRIGHT,  
*Minneapolis, Minnesota,*  
PIERCE BUTLER,

*St. Paul, Minnesota,*  
*Solicitors and Attorneys for Appellant.*

**APPELLANT'S  
REPLY  
BRIEF**

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WM. R. S.

# Supreme Court of the United States.

OCTOBER TERM, 1921.

No. 472. 10

ST. CLOUD PUBLIC SERVICE COMPANY,

*Appellant,*

*v.s.*

CITY OF ST. CLOUD.

*Appellee.*

## Appellant's Reply Brief.

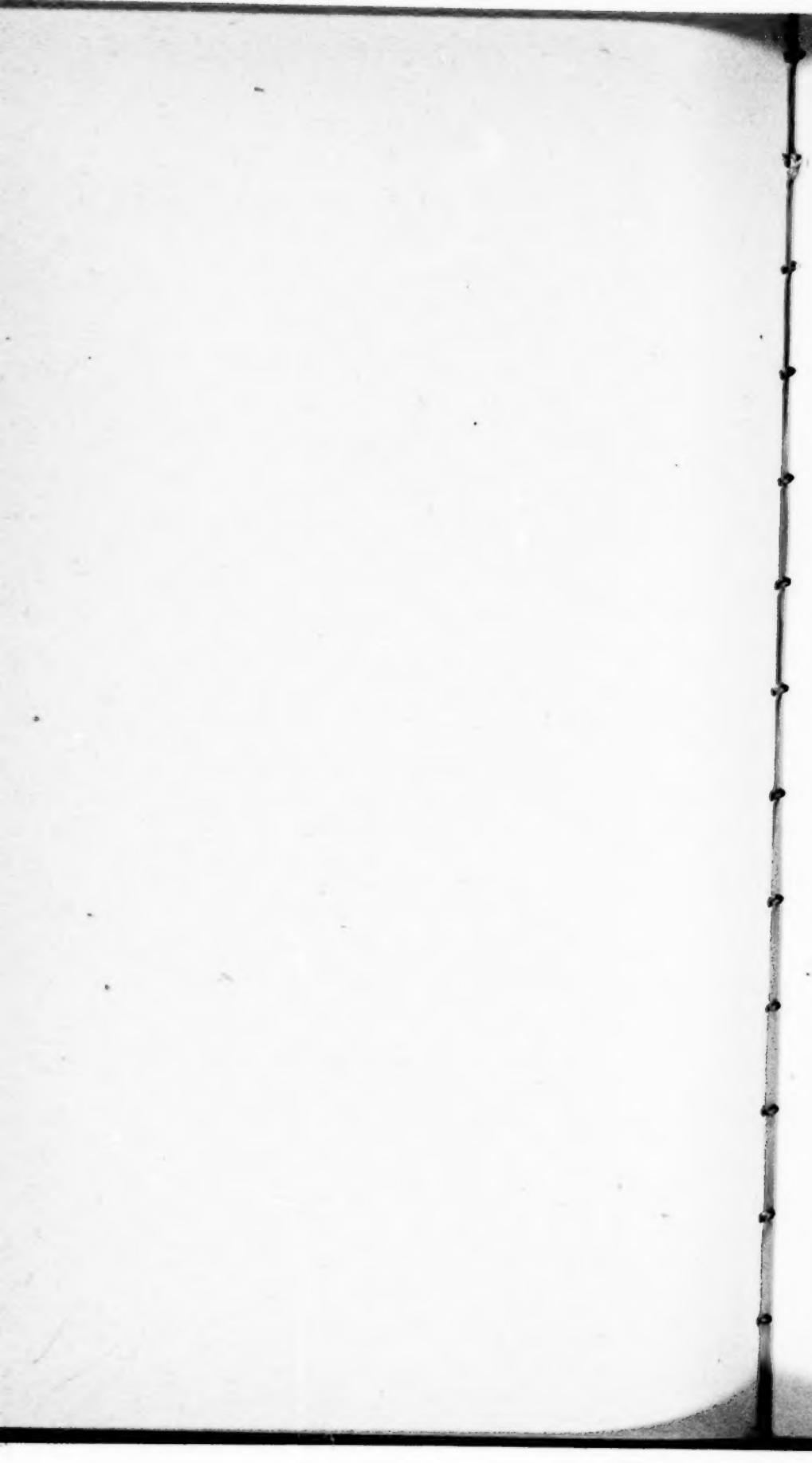
J. O. P. WHEELWRIGHT,

Minneapolis, Minnesota

*Attorney and Solicitor for Appellant.*

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# **Supreme Court of the United States.**

OCTOBER TERM, 1921.

No. 472.

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**ST. CLOUD PUBLIC SERVICE COMPANY,**

*Appellant,*

*vs.*

**CITY OF ST. CLOUD.**

*Appellee.*

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## **Appellant's Reply Brief.**

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In our original brief we attempted to sustain the following propositions:

1. While the city charter of the City of St. Cloud conferred upon its common council authority to regulate and prescribe the fees, rates and charges of public utilities, it did not provide that the council might contract or agree with respect to such fees, rates and charges; and hence it follows that it had no power to enter into a contract fixing unalterably during the term of the franchise granted by Ordinance 160, charges for gas service and thereby disabling itself from exercising the charter power of regulation.
2. The power of a municipality to fix the rates to be charged by a public service corporation is embraced within its governmental and legislative

powers as contradistinguished from its business or proprietary powers.

3. The surrender by contract, of a power of government, is a very grave act, and the surrender itself, as well as the authority to make it must clearly and unmistakably appear. Specific authority is required.

4. That any irrevocable contract between the parties to this cause fixing gas rates for a term of years violates that section of the Constitution of the state of Minnesota prohibiting the granting to any corporation, association or individual any special or exclusive privilege, immunity or franchise whatever.

*Opelika Sewer Co. v. The City of Opelika*, 280 Fed. 155.

*City of New Orleans v. O'Keefe*, 280 Fed. 92.

These cases were not cited in our original brief.

5. That there is nothing in Section 6 of the franchise ordinance requiring the grantee to furnish gas at the rates therein specified, nor is there anything therein to indicate that the grantee ever surrendered its constitutional right to have just compensation.

Counsel having cited *Vicksburg v. Vicksburg Water Works Company*, 206 U. S. 497; *City of Cleveland v. Cleveland City Railway Company*; *Milwaukee Electric Company v. Railroad Commission of Wisconsin*, 238 U. S. 174. The distinction between these cases and the one at bar is clearly pointed out in the *Home Telephone Company* case

(211 U. S. 215), cited on page 20 of our original brief.

The case of *Columbus Railway, Power & Light Company v. City of Columbus* (249 U. S. 399), is also cited. But the court clearly points out that it was controlled by *Cleveland City Railway Company v. City of Cleveland, supra*. In *Milwaukee Electric Light Company v. Railroad Commission* (238 U. S. 174), this court felt compelled to follow the construction given to a Wisconsin statute by the highest court of that state.

*Cedar Rapids Gas Light Co. v. Cedar Rapids* (233 U. S. 667), is also cited by appellee. In that case the court below recognized that the act of a municipality in fixing rates was purely legislative, but that rates could not be so fixed as to fail to afford fair compensation for the services rendered. But it found upon the merits that it could not be said that the ordinance rate complained of failed to meet the requirements of the Constitution, declaring that if upon a fair trial and test the rate should be found not to be remunerative a remedy would be applied. So that this court in affirming the decree of the Iowa Supreme Court had no occasion to consider or pass upon the question involved herein. Counsel also cites *Knoxville Gas Company v. City of Knoxville* (261 Fed. 283). That case was cited by us in our original brief because it held that neither the Knoxville charter nor any statute of Tennessee delegated to the city the power of the state to regulate rates to be charged by a public utility, and hence a franchise contract en-

tered into between the complainant and the city fixing the rate could not in that respect be enforced by the city, when by reason of changed conditions the rate fixed was not compensatory.

The gross earnings referred to by the appellee on page 2 of its brief include those derived by complainant from the operation of its electric plant as well as those derived from the operation of its gas plant.

In fixing the price of gas complainant is not entitled to recoup its losses upon sales of electricity.

*Municipal Gas Co. v. Public Service Commission*, 121 N. E. 772.

For the reasons herein stated we again respectfully urge that the decree appealed from should be reversed.

J. O. P. WHEELWRIGHT,  
*Attorney and Solicitor for Appellant.*



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# Supreme Court of the United States.

OCTOBER TERM, 1921.

No.  10

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ST. CLOUD PUBLIC SERVICE COMPANY,

*Appellant,*

*vs.*

CITY OF ST. CLOUD,

*Appellee.*

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## Brief on Behalf of Appellee.

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R. B. BROWER,

*St. Cloud, Minnesota,*

*Solicitor and Attorney for Appellee.*



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# **Supreme Court of the United States.**

OCTOBER TERM, 1921.

No. 472.

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ST. CLOUD PUBLIC SERVICE COMPANY,

*Appellant,*

*v.s.*

CITY OF ST. CLOUD,

*Appellee.*

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## **Brief on Behalf of Appellee.**

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### **STATEMENT OF CASE.**

We desire to briefly summarize the issues, as we understand them, and to call attention to some additional facts.

Appeal from the Final Decree of the United States District Court, District of Minnesota, dismissing appellant's bill of complaint for want of equity.

Appellant's predecessor in interest, in the month of December, 1905, prepared, submitted and secured the passage of, contractual ordinance No. 160 of the City of St. Cloud, granting to it and its assigns, for the period of approximately thirty years, the privilege of supplying electricity and gas to the

City and its inhabitants, contracting for the construction of a gas plant and stipulating to the maximum rate of \$1.35 per thousand cubic feet for fuel gas.

For fifteen years, appellant and its predecessor operated under this franchise, and, with the exception of a very brief period, furnished and supplied fuel gas at the maximum ordinance rate of \$1.35 per thousand cubic feet.

Suit was brought by appellant wherein it claimed that the terms of the contractual ordinance fixing the maximum rate for gas were confiscatory and non-compensatory and a taking of the property of appellant without due process of law, in violation of the Federal Constitution. Appellant did not deny full acceptance of the terms of the contractual ordinance. It claimed that the City possessed no power to contract. It also claimed that the franchise ordinance, as to the maximum rate, was not contractual, but merely legislative in its terms.

The record shows that the gross earnings of appellant for the year ending December 31, 1918, were \$323,722.99 (page 69); that its gross earnings for the year ending September 30, 1919, were \$422,960.60, and its net earnings for that period were \$194,196.57 (page 75); and that its gross earnings for the year ending September 30, 1920, were \$603,358.68, and its net earnings for that period were \$280,549.97 (page 69).

The bill of complaint admits that appellant operated its gas plant at a profit up to December 31,

1916 (page 8).

Appellant sought to increase its rate for fuel gas to \$3.39 per thousand cubic feet.

Defendant filed motion to dismiss upon the following, among other, grounds:

1st. That it conclusively appears that the complainant is furnishing gas service to the defendant and its inhabitants in compliance with the terms of a contractual ordinance, limiting the maximum cost of fuel gas to the sum of \$1.35 per thousand cubic feet of gas, and that complainant is bound by said contractual ordinance.

2nd. For want of equity in said action.

The trial Court denied the motion for injunction and granted the defendant's motion to dismiss upon the grounds stated above. The decision of the trial Court will be found at pages 142-161 of the record. Final Decree dismissing the bill of complaint was entered and plaintiff appealed to this Court.

#### SUMMARY OF ISSUES.

1. Did the City of St. Cloud have power, under its charter, to make this franchise contract?
2. At the time the contract was made, were there any existing provisions of the constitution of Minnesota prohibiting the delegation by the Legislature of the State, of power to make such contract covering maximum rates for service?
3. Was it error for the Minnesota District Court to determine and conclude that the statutes of Minnesota and the decisions of its Courts of last re-

sort, indicative of the policy of the State, coupled with the provisions of the charter of the City of St. Cloud, sustained the validity of the contract ordinance?

4. Is the language of Ordinance No. 160 contractual in form, or merely legislative?

#### POINT 1.

APPELLEE, UNDER ITS CHARTER, WHEREIN IT WAS INCORPORATED AS A CITY UNDER THE PROVISIONS OF CHAPTER 8, SPECIAL LAWS OF MINNESOTA FOR 1868, AND ACTS AMENDATORY THERETO, AS FINALLY CONSOLIDATED AND MERGED IN MINNESOTA SPECIAL LAWS OF 1889, CHAPTER 6, HAD FULL AND AMPLE POWER TO ENTER INTO A CONTRACT PROVIDING FOR THE MAXIMUM RATE FOR GAS, AS CONTAINED IN SECTION 6, OF CONTRACTUAL FRANCHISE ORDINANCE NUMBER 160.

St. Cloud was originally incorporated by a legislative act in 1862, as the Town of St. Cloud (Chapter 4, Special Laws of Minnesota, for 1862). It was provided with a town council form of government. To it was delegated all general powers possessed by municipal corporations at common law. Various specific powers were also delegated. Subdivision 10, of Section 1, of Chapter 4 of these special laws, reads as follows:

“Tenth. To make and establish public

pounds, pumps, water cisterns and reservoirs, and to provide for the erection of water works, for the supply of water to the inhabitants, to erect lamps or other means whereby to light the town, to regulate and license hacks, cabs, drays, carts and charges of hackmen, coachmen, draymen and cartmen of the town."

The City of St. Cloud was incorporated, superseding the town, by Minnesota Special Laws of 1868, Chapter 28. By the terms of that chapter, the city, as a municipal corporation, was declared capable of contracting and being contracted with, possessing all of the general powers possessed by municipal corporations at common law, and in addition thereto "shall possess the powers hereinafter specifically granted, and the authorities thereof shall have perpetual succession."

Subdivision 11 of Section 3, Chapter 4 of said Special Laws included in the grant of special powers, reads as follows:

"Eleventh. To establish and construct public pounds, pumps, wells, cisterns, reservoirs, and hydrants; to erect lamps and provide for the lighting of the city, and to control the erection of gas works or other works for lighting the streets, public grounds and public buildings, and to create, alter and extend lamp districts; to regulate and license hacks, carts, omnibusses and the charges of hackmen, draymen, cab men and omnibus drivers of the City."

Amendments to this act of incorporation of the City, passed by the Legislature in the form of special legislative acts, were as follows:

Special Laws of 1869, Chapters 9, 10 and 11.

Special Laws of 1874, Chapter 20.  
Special Laws of 1875, Chapter 104.  
Special Laws of 1876, Chapter 38.  
Special Laws of 1878, Chapter 46.  
Special Laws of 1885, Chapter 12.  
Special Laws of 1887, Chapters 115 and 178.

The Supreme Court of Minnesota, in many decisions hereinafter cited, repeatedly held that the constitutional amendment of November 8, 1881, did not bar or forbid the amendment and consolidation by the Legislature of special laws enacted prior to the adoption of that constitutional amendment.

Then followed the enactment of Chapter 6, Minnesota Special Laws of 1889, entitled:

"An Act to Consolidate in one Act the Charter of the City of St. Cloud, and to amend the same."

This act contains no repealing clauses.

Section 1 of this act reads as follows:

Section 1. The act entitled "An Act to reduce the act incorporating the town of St. Cloud, and to repeal a former charter of said town, approved March eighth (8th) eighteen hundred and sixty-two (1862), and the several acts amendatory thereto in one act, and to amend the same, and to incorporate the City of St. Cloud," approved March sixth (6th), eighteen hundred and sixty-eight (1868), and the several acts amendatory thereof, are hereby consolidated and reduced to one act, and amended so as to constitute the charter of the City of St. Cloud, which shall read as follows.

PERTINENT PROVISIONS OF THE AMENDATORY ACT,  
CHAPTER 6, SPECIAL LAWS OF 1889.

Section 1. Chapter 1 (page 132, Special Laws 1889) provides for the incorporation of the territory mentioned, as a municipal corporation, under the name of City of St. Cloud, and, among other powers, declares that the city—

"\* \* \* shall be capable of contracting and being contracted with, and shall have all the powers possessed by municipal corporations at common law, and in addition thereto, shall possess all powers hereinafter granted; and all the authorities thereof shall have perpetual succession."

Section 1 contains the general welfare clause.

Section 5 reads, in part, as follows (page 144, Special Laws of 1889) :

"The common council shall have full power by ordinance: \* \* \*

10. To make and establish pounds, wells, cisterns, hydrants, reservoirs, and fountains, and to provide for and conduct water into and through the streets, avenues, alleys and public grounds of the city; and to provide for and control the erection of water works in said city, for the supply of water for said city and its inhabitants; and to grant the right to one or more private companies or corporations to erect and maintain water works for such purpose, and to authorize and empower such companies or corporations to lay water pipes and mains into, through, and under the streets, avenues, and public grounds of the city. And when necessary for carrying out the purpose of said

companies or corporations, to appropriate private property in said city to the use of said companies or corporations in the manner provided in this charter, for the appropriation of private property for public use; and to control the erection and operation of such water works, and the laying of such pipes and mains IN ACCORDANCE WITH SUCH TERMS AND CONDITIONS AS MAY HAVE BEEN HERETOFORE OR SHALL BE HEREAFTER AGREED UPON BETWEEN SAID CITY AND SAID CORPORATIONS OR COMPANIES. TO PROVIDE FOR AND CONTROL THE ERECTION AND OPERATION OF GAS WORKS, ELECTRIC LIGHTS, OR OTHER WORKS OR MATERIALS FOR LIGHTING THE STREETS AND ALLEYS, PUBLIC GROUNDS, AND BUILDINGS OF SAID CITY, AND SUPPLYING LIGHT AND POWER TO SAID CITY AND ITS INHABITANTS, AND TO GRANT THE RIGHT TO ERECT, MAINTAIN AND OPERATE SUCH WORKS, WITH ALL RIGHTS INCIDENT OR PERTAINING THERETO, TO ONE OR MORE PRIVATE COMPANIES OR CORPORATIONS, and to control the erection and operation of such works and laying of pipes, mains and wires into, through and under the streets, avenues alleys, and public grounds of said city, and the erection of poles and mainstays, and the stringing or wires thereon, over, in, upon, and across the streets, alleys and public grounds; to provide for and control the erection and operation of works for heating the public buildings of said city by steam, gas, or other means, and supplying light and heat and power to the inhabitants of said city; TO GRANT THE

RIGHT TO ERECT SUCH WORKS AND ALL INCIDENT RIGHTS TO ONE OR MORE PRIVATE COMPANIES OR CORPORATIONS, AND TO CONTROL AND REGULATE THE ERECTION AND OPERATION OF SUCH WORKS, and the laying of mains into, through and under the streets, alleys, and public grounds of said city; provided, that every grant to a company or corporation of the right to erect or maintain any of said works shall provide that the city or its successor may purchase the same at such time and in such manner as shall be prescribed in the grant; AND PROVIDED FURTHER, THAT THE COMMON COUNCIL SHALL HAVE AUTHORITY TO REGULATE AND PRESCRIBE THE FEES AND RATES AND CHARGES OF ANY AND ALL COMPANIES HEREINBEFORE MENTIONED."

"34th. To regulate and control the quality and measurement of gas. To prescribe and enforce rules and regulations for the manufacture and sale of gas, the location and construction of gas works, and the laying, maintaining and repairing of gas pipes, mains and fixtures, to provide for the inspection of gas and gas meters, and to appoint an inspector if needed, and prescribe his duties."

Chapter 14, Section 7, reads as follows:

"No law of the state concerning the provisions of this act, shall be considered as repealing, amending, or modifying the same, unless said purpose be expressly set forth in such law."

From the foregoing provisions of its charter, it is clear that the city had the following powers expressly granted:

1. To erect and operate gas or electric works of its own to supply light and power to the city and its inhabitants;
2. To grant the right to one or more private companies to do these things, and to control the erection and operation by said grantee;
3. To erect and operate works of its own for heating by steam, gas, or other means, to supply heat and power to the city and its inhabitants;
4. To grant the right to one or more private companies to do these things and to control and regulate the erection and operation by said grantee;
5. To purchase from any company such works erected and operated by it;
6. To regulate and prescribe the fees, rates and charges of all such companies;
7. To regulate and control the quality and measurement of gas;
8. To prescribe and enforce rules and regulations relative to the location of gas works, and regulations relative to the location of gas works and their construction; relative to laying, maintaining and repairing of pipes; relative to the manufacture and sale of gas; and to provide for inspection of gas and gas meters.

It is significant that in subdivision 10, of Section 5, the following language authorizing agreements with respect to the laying of pipes and mains for water supply, and extending to all corporations or companies, appears:

**"IN ACCORDANCE WITH SUCH TERMS  
AND CONDITIONS AS MAY HAVE BEEN**

HERETOFORE OR SHALL BE HERE-AFTER AGREED BETWEEN SAID CITY AND SAID CORPORATIONS OR COMPANIES."

Section 10 deals with all of the important classes of public service, water, electricity, gas and heat. Power was delegated to grant the right to erect such works, and all incident rights, to one or more private companies or corporations, and to control and regulate the erection and operation of such works. Furthermore, the common council was expressly given authority to prescribe the fees and rates and charges of any and all of such companies. Upon the passage of the ordinance, the grantee proceeded to conform to its terms and constructed a new gas plant. No restraint was embodied in this ordinance in respect to the rates or charges for electric current. This was the point in which the grantee was particularly interested. Its success in securing this ordinance, bound it and its successors to the erection and operation of an efficient coal gas generating plant, of ample capacity as stipulated in the ordinance, and to the manufacturing and offering for sale, to the city and its inhabitants, of said supply of fuel gas at the rate of not to exceed \$1.35 per thousand cubic feet. Such was the consideration that passed to the city for the granting of the franchise ordinance covering the grantee's electrical and gas business to be conducted in St. Cloud.

The grantee, on August 17, 1915, assigned and transferred Ordinance No. 160, and all rights there-

under, to appellant (Sub. A, Section 3 page 31, Record).

No question was made, and we submit none could have been made, as to the complete acceptance of this ordinance by the appellant's predecessor in interest and by the appellant itself.

In 1919, appellant declared:

"The franchise in St. Cloud was granted in December, 1905, for a period of thirty years \* \* \* and is favorable in every way" (page 77).

In 1920, a similar declaration was made (page 71).

Appellant's predecessors, with precisely the same executive management, as well as corporate ownership, prepared, presented to the council, and solicited the passage of this ordinance. Its attorney appeared before the council and urged its passage (Record, page 81). Wide publicity was given to the benefits of this contractual ordinance by the grantee. Written acceptance was unnecessary. It accepted the terms, rendered the service, received the returns for many years, and now attempts to repudiate but one provision of its contract.

*City Railway Company v. Citizens Street R'y. Co.*, 166 U. S. 557-568, and cases cited.

*Bank of U. S. v. Dandridge*, 25 U. S., 12 Wheat., 64-70.

*McQuillan*, Vol. 4, Sec. 1650, page 3467.

*Columbus Railway Power & Light Co., v. City of Columbus*, 249 U. S., 399-412.

*City of Red Wing v. Wisconsin-Minnesota Light and Power Co.*, 139 Minn., 240.

**ORDINANCE NO. 160.**

Ordinance No. 160 was duly passed by the common council of the City of St. Cloud, on December 18th, 1905. It was duly approved by the Mayor of the City on the following day (page 5).

The ordinance in question reads as follows:

**"Ordinance No. 160.**

**An Ordinance Granting the Right to Acquire, Construct, Maintain and Operate Works for the Production, Manufacture and Sale of Electricity and for the Manufacture and Sale of Gas in the City of St. Cloud, Minnesota.**

**The Common Council of the City of St. Cloud do Ordain:**

**Section 1.** That the right and privilege is hereby granted to the Public Service Company of St. Cloud, Minnesota, to acquire, construct, maintain and operate in the City of St. Cloud, Minnesota, works and instrumentalities for the production, manufacture, distribution and sale of electricity for illuminating, power, fuel and other purposes, and for the manufacture, distribution and sale of gas for illuminating, power, fuel and other purposes, and for that purpose to erect and maintain in all the streets, avenues, alleys and public places of the City of St. Cloud, such poles, wires and cables as may be necessary for the purpose of the manufacture, distribution and sale of electricity, and to lay down in any of the streets, avenues, alleys and public places in said City of St. Cloud such mains and service connections as may be necessary in the distribution and sale of gas for the purposes aforesaid.

The rights, privileges and franchises hereby granted shall expire on the first day of December, A. D. 1935.

**Section 2.** The grantee named in Section One of this ordinance is hereby authorized to produce, manufacture and vend electricity for lighting, fuel, power and other purposes and to manufacture and vend gas for light, fuel and other purposes to the City of St. Cloud and the inhabitants thereof for and during the period aforesaid.

**Section 3.** That the said grants shall vest in said grantee full power and license to make all necessary erections and excavations necessary for the purposes aforesaid under the direction of the City Engineer, but the same shall be done with due and reasonable dispatch and diligence and with the least practicable inconvenience to or interference with the rights of the public and individuals, and the said grantee shall restore all streets, alleys, sidewalks and public places where excavated by it to their original condition as far as practicable, and all damages done by such excavation shall be repaired by such grantee, and in case any obstructions caused by such excavations shall remain longer than twenty-four hours after notice to remove the same, or in case of neglect on the part of said grantee to protect any dangerous places by proper guards, then the said city may remove or protect the same at the cost of said grantee.

**Section 4.** That in laying down pipes or erecting wires, said grantee shall conform to all reasonable regulations prescribed by said city to prevent unnecessary injury to the streets, alleys, sidewalks and public places, and shall not interfere with or injure any water pipes, drains or sewers of said city.

**Section 5.** In consideration of the rights and privileges herein granted, the grantee hereby covenants and agrees that it will prior to the

first day of January, A. D. 1907, erect or cause to be erected in the City of St. Cloud an efficient coal gas generating plant or system of ample capacity, and after the erection thereof will manufacture and offer for sale to the city and its inhabitants coal gas of at least fourteen candle power, and in the meantime will furnish gas from the present gas works of the grantee of the standard now manufactured therein.

Section 6. The grantee is authorized hereby to sell illuminating gas when the works therefor shall have been completed, of a standard of fourteen candle power at the price of not to exceed one dollar and 85/100 (\$1.85) per thousand cubic feet, and fuel gas at the rate of not to exceed one and 35/100 dollars (\$1.35) per thousand cubic feet, and the grantee shall be at liberty to cut off the supply from any person failing or refusing to pay for gas furnished for a period of thirty days."

Section 7, of the ordinance, provides for purchase by the City, of the electric and gas works of the grantee on the 1st day of January, 1911, and at five year intervals thereafter, at an appraised value to be determined as provided.

Section 8, of the ordinance, states that the grantee named in the ordinance shall mean the Public Service Company of St. Cloud, Minnesota, or its successors and assigns.

Many cases decided by this Court, are collected by the respective authors, in support of the following statements of the law:

"Restrictions, limitations or conditions relating to and regulating rates have a proper relationship to the subject matter of the grant,

and may, under proper legislative authority, be made a matter of stipulation in connection therewith. A maximum rate prescribed by the ordinance, when it is made a condition of the franchise, is binding upon the grantee of the franchise, and it cannot escape therefrom."

*Dillon* (Fifth Ed.), Sec. 1328.

"Accordingly, where a municipality grants the right to use streets for gas pipes, it may provide that the charge for gas furnished the city and its inhabitants shall not exceed certain prices, without regard to whether the municipality has power to regulate the rates of the company."

*McQuillan*, Vol. 4, Sec. 1738, p. 3719.

In the case of *Vicksburg v. Vicksburg Water Works Co.*, 206 U. S. 497, the ordinance provided that the grantees, their associates or assigns, should have the right \* \* \* to make such rates and charges for the use of said water as they may determine, provided that such rates and charges shall not exceed fifty cents for each thousand gallons of water.

Held sufficient to create a contract.

In *Columbus Railway Power & Light Co. v. City of Columbus*, a rate of fare of eight tickets for twenty-five cents, with universal free transfers, upon a street railway, constitutes in Ohio, when accepted by the grantee, a valid contract mutually binding for the period named.

In the case of *City of Cleveland v. Cleveland City Railway Co.*, 194 U. S. 517, the ordinance provided:

"The said Company shall not charge more

than five cent fare each way for one passenger over the whole or any part of said line, etc."

Held a contract.

In *Milwaukee Electric, etc. Co. v. Railroad Commission of Wisconsin*, 238 U. S. 174, an ordinance providing for a rate of fare \* \* \* not to exceed five cents for a single fare, etc., held a contract.

In *City of Cleveland v. Cleveland Electric Ry. Co.*, 201 U. S. 529, the ordinance provided:

"and that for a single fare from any point to any point on the lines and branches of the consolidated road no greater charge than five cents shall be collected, etc."

Held a contract, the impairment of which was permanently enjoined.

In *Cedar Rapids Gas Light Co. v. Cedar Rapids* 223 U. S. 667, the franchise ordinance provided:

"In consideration of the privileges herein granted to said Company, it shall furnish to the inhabitants of said city gas for lighting at a price not to exceed \$1.80 per thousand feet, etc."

Held a promise by the company based on a consideration, and that under the code of Iowa the stipulation was subject to the power retained by the city to regulate.

In *Knoxville Gas Co. v. City of Knoxville*, 261 Fed. 283, the ordinance in question provided:

"Also to furnish gas of a given candle power to consumers within the city at a price of not more than \$1.10 per thousand cubic feet."

It was held that the language in question was sufficient to create a contract.

In the San Antonio case, 257 Fed. 467, an ordinance case, the ordinance provided:

"Said Street Car Company shall charge five cents fare for one continuous ride," etc.

Held sufficient to constitute a contract, but that the city possessed no power to make same.

In *Muncie Natural Gas Co. v. City of Muncie*, 66 N. E. (Ind.) 436, 60 L. R. A. 822, the ordinance contained a proviso to the effect that the total cost of gas to consumers for private purposes should not exceed a certain schedule. This was held sufficient to create a contract.

In *Omaha Water Co. v. Omaha*, 77 C. C. A., 267; 147 Fed. 1, a case removed upon appeal to this Court, but wherein the appeal was dismissed, the ordinance in question provided that water should be furnished to private consumers at rates not exceeding the rate set forth in the ordinance, and as the company and the consumers might agree upon.

Held a contract.

The Court say:

"Any reduction of these rates necessarily impairs the obligation of this contract, etc.  
\* \* \* The order of the water board which attempts to reduce the agreed rates impairs the obligation of this contract."

Indiana and Missouri cases are cited in support of the following text in R. C. L., Vol. 12, p. 899:

"For example, where the Gas Company has accepted an ordinance prescribing maximum rates and has installed its plant thereunder, the municipality is without power to fix any

schedule of maximum rates. The first ordinance, after acceptance, amounts to a contract and cannot be altered at the instance of one party thereto."

DECISIONS OF THE FEDERAL COURT SITTING IN MINNESOTA, AND OF THE SUPREME COURT OF THE STATE OF MINNESOTA.

In each of the following cases, the validity of Minnesota franchise contracts, containing provisions fixing and limiting maximum rates to be charged for service, or, in lieu thereof, contractual resort to arbitration, as provided by the terms of the ordinance, was upheld. For the sake of brevity, we will merely cite them now. We will endeavor to fully present these decisions of the Minnesota Courts under Point Three of this brief.

*Anoka Water Works, etc., Co. v. City of Anoka*,  
109 Fed. 580.

*City of Moorhead v. Union Light and Power Company*, 255 Fed. 920.

*Fergus Falls Water Co. v. City of Fergus Falls*,  
65 Fed. 586.

*Reed v. City of Anoka*, 85 Minn., 294.

*City of St. Cloud v. Water, Light and Power Co.*, 88 Minn. 329.

*City of Red Wing v. Wisconsin-Minnesota Light and Power Co.*, 139 Minn., 240.

*City of Duluth v. Duluth Street Ry. Co.*, 145 Minn., 55-59.

## PERMISSIVE CONTRACTS.

Permissive contracts and their validity, are recognized in numerous Federal and State Court decisions. Although a city had no express power to make an inviolable rate contract, such contracts are, nevertheless, binding on the parties until abrogated or altered by the legislature, directly or through a duly authorized commission.

*Puget Sound Co. v. Reynolds*, 244 U. S., 574.

*Worcester v. Railway Co.*, 196 U. S. 539-552.

*Milwaukee Ry. Co. v. Wisconsin R. R. Commission*, 238 U. S. 174.

*Omaha Water Co. v. City of Omaha*, 147 Fed. 1.

*Muncie Ind. Gas Co. v. Muncie*, 160 Ind., 97; 60 L. R. A., 822.

*City of Manitowoc v. Manitowoc Etc. Co.*, 129 N. W., 925.

*Traverse City v. Michigan R. R. Commission*, 168 N. W. 481.

Permissive contracts are recognized in Minnesota.

In *City of Red Wing v. Wisconsin-Minnesota Light and Power Company*, *supra*, the Supreme Court of Minnesota recognized the validity of permissive contracts between a municipality and a public service corporation, even in the absence of express power to make a rate contract, or to grant a franchise, or prescribe rates.

The only power delegated to Red Wing was au-

thority "to erect lamps or other means whereby to light the City." The ordinance provided for arbitration of rates at fixed intervals. The Supreme Court sustained the contract.

The Court say:

"It is not questioned, and could not well be, that in a franchise ordinance rates and the manner of fixing them, both for the City and its inhabitants, could be provided for, subject to the right of subsequent legislative interference."

Appellee had power to make this contract.

#### NO PUBLIC UTILITY OR PUBLIC SERVICE COMMISSION IN MINNESOTA.

Minnesota has never had a public utility or public service commission, or kindred body, clothed with power to supervise or regulate the business methods or management of, or fix, determine, or adjust, the rates of service of gas, electric or water companies engaged in the public service. In the absence of such a commission, and of such supervising authority, the cities and villages of Minnesota have uniformly, both before and since the constitutional amendment of November 8, 1892, provided for this service under their own franchise ordinances and contracts, and in the exercise of their administrative and business powers.

Such being the situation, it followed that there was, from the beginning of statehood, not only widespread and complete delegation of power to

the cities and municipalities of the State, but there was recognition, in the general statutes of the State, of the authority of the municipalities to impose upon public service corporations, in franchises granted, such conditions and restrictions as might be named.

Section 6137, G. S. 1913, found at Section 2842 Revised Laws of 1905, and originating in Chapter 19, Minnesota Laws of 1895, reads as follows:

**"6137. STATE AND LOCAL CONTROL—**  
 The state shall at all times have the right to supervise and regulate the business methods and management of any such corporation (public service corporations), and from time to time to fix the compensation which it may charge or receive for its services; *and every such corporation obtaining a franchise from a city or village shall be subject to such conditions and restrictions as from time to time may be imposed upon it by such municipality."*

While there is reserved, under this old section of the Statutes of Minnesota, the right of state supervision and regulation, that right in respect to the matter of the fees and charges of public service corporations, rendering to municipalities electrical, gas and water service, HAS NEVER BEEN EXERCISED BY THE STATE.

On the contrary, *except in cases where there were contract obligations or franchise provisions existing between any city and any such public service corporation furnishing gas or electric current*, all cities of the third and fourth classes in Minnesota, were, by the provisions of Chapter 469, Laws of Minne-

sota of 1919, authorized to prescribe a rate for such service.

This legislative act is fully set out at pages 10-13 of Appellant's Brief.

The EXCEPTION in the act, being a portion of Section 1 thereof, reads as follows:

"Provided that nothing herein shall be construed to impair the obligation of any contract or franchise provision now existing between any such city and any such public service corporation."

It is clear that the legislature not only omitted to recall power theretofore conferred, but expressly protected and safe-guarded contracts and franchise provisions then existing.

Appellant made application, under the terms of this statute, for the fixing of rates for gas service. It asked nothing so far as rates for electrical current were concerned. There was present in the law this express exception. The petition was not entertained by the City Commission, but was returned to the appellant.

Were Minnesota, in the future, to revolutionize her public policy with respect to local control of public service corporations furnishing electric, gas and water facilities, and provide a State Public Utility or Public Service Commission, with wide powers to fix, determine and adjust rates for such public service, still, appellee, would be secure in the possession of this franchise contract, at least until such commission had expressly found that the rates were "unjust, unreasonable, unjustly dis-

criminator or unduly preferential."

Such was the very recent declaration of this Court in the case of

*Wichita Railroad & Light Co. v. Public Utilities Commission of Kansas*, U. S. Adv. Ops. 1922-23, page 52.

## POINT 2.

THE AMENDMENTS TO THE CONSTITUTION OF MINNESOTA, ADOPTED NOVEMBER 8th, 1881, AND NOVEMBER 8th, 1892, EXPRESSLY PROTECTED EXISTING SPECIAL LEGISLATIVE CHARTERS. THE FIRST AMENDMENT, AS INTERPRETED BY THE MINNESOTA SUPREME COURT, DID NOT BAR, BETWEEN 1882 AND 1892, THE AMENDMENT OF EXISTING CHARTERS BY THE STATE LEGISLATURE. ST. CLOUD'S CHARTER OF 1889, SPECIAL LAWS, CHAPTER 6, WAS AN ACT CONSOLIDATING AND REDUCING TO ONE ACT, ITS CHARTER OF 1868, AND ACTS AMENDATORY THEREOF, AND AMENDING THE SAME. THE LEGISLATURE OF THE STATE HAD FULL AND UNIMPAIRED POWER TO ENACT THESE AND SIMILAR LAWS.

The constitutional amendment of November 8, 1881, as amended November 8, 1892, did not deprive the appellee of its right, under its charter, to

contract as it did, under the terms of Ordinance No. 160.

There are specific exceptions in these constitutional amendments, to which attention is not directed by appellant, as hereinafter more fully discussed. Moreover, as we shall show, that the settled public policy of Minnesota, as reflected in its legislation and in the decisions of its courts of last resort, as well as subsequent constitutional amendments substituting, at the will of the municipalities, home rule charters for special legislative charters, clearly sustains the validity of appellee's charter powers, as exercised by it in the passage of Ordinance No. 160.

#### CONSTITUTIONAL AMENDMENT OF NOVEMBER 8, 1881.

The constitutional amendment of November 8, 1881, proposed by Chapter 3, General Laws for 1881, found at pages 21 and 22 of Minnesota Laws for that year, provided as follows:

"Sec. 33. The legislature is prohibited from enacting any special or private laws in the following cases:

7. For granting corporate powers or privileges, EXCEPT TO CITIES.

10. For granting to any individual, association or corporation, except municipal, any special or exclusive privilege, immunity or franchise whatever.

But the legislature may repeal any existing special law relating to the foregoing subdivision."

As has been shown, St. Cloud, at the time of

the adoption of the 1881 constitutional amendment, was operating as a city, under its 1868 charter. The legislative power to amend this charter and to consolidate the various legislative enactments under which it had operated, was provided for in the constitutional amendment of 1881. The existence of such power was repeatedly recognized in numerous decisions of the Supreme Court of Minnesota, decided after the adoption of the constitutional amendment of 1881. Some of these cases present situations with respect to the previous organization of boom companies and street railway companies; some refer to questions in relation to the incorporation of villages; *but in none of these decisions was the right of the legislature questioned with regard to the exercise of power to alter, or amend, or consolidate into a single special act, prior special municipal charters. That right was expressly declared as continuing after 1881 and until 1892.*

These cases are as follows:

- Green v. Knife Falls Boom Company*, 35 Minn. 155.  
*State v. Spaude*, 37 Minn. 322.  
*Eike v. Minnesota*, 38 Minn. 366.  
*Minnesota Loan and Trust Company v. Beebe*, 40 Minn. 7.  
*State v. Sheriff*, 48 Minn. 236.  
*State v. Beck*, 50 Minn. 47.  
*State v. Village Council of Cloquet*, 52 Minn. 9.  
*State v. Porter*, 53 Minn. 279.  
*City of Duluth v. Duluth Street Ry. Co.*, 60 Minn. 178.

*Brady v. Moulton*, 61 Minn. 185.

*State v. Wisecell*, 61 Id. 465.

In *Brady v. Moulton*, *supra*, the validity of Special Laws of 1891, Chapter 175, authorizing a village in the state to issue bonds for waterworks, was questioned. The Court sustained the validity of this special act, holding it was a grant of corporate powers or privileges, within the meaning of the constitutional provision referred to.

"The constitutional amendment of 1881 was, with certain changes, not material here, copied bodily from the constitutional amendment of 1871 in the state of Wisconsin, subdivision 7 (the one here involved) being verbatim subdivision 7 of the amendment of 1871 in that state. In 1874—seven years before we adopted it—this subdivision had been construed by the Supreme Court of Wisconsin as relating only to acts of incorporation thereafter to be granted, and as not impairing the legislative power of alteration or repeal in respect to charters granted prior to the adoption of the constitutional amendment. *Attorney General v. Railroad Cos.*, 35 Wis. 425, 560. In that case, Chief Justice Ryan, speaking for the court, said: We feel bound to hold, and find no difficulty in holding, the phrase in the amendment, 'to grant corporate powers or privileges,' to mean 'in *principio Donationis*,' and equivalent to the phrase, 'to grant corporate charters.' This is implied not only in the word 'grant,' but also by the word 'corporate.' A franchise is not essentially corporate; and it is not the grant of franchise which is prohibited, but of corporate franchise,—that is, as we understand it, franchise by act of incorporation.

This construction has been uniformly adhered to by the courts of that state. From 1881 down to the adoption of the much more sweeping and radical amendment of 1891, the legislature of this state assumed and acted upon the same construction. The acts are very numerous amending by special law the special charters of villages organized prior to 1881. Large interests are doubtless now dependent upon the validity of such legislation. To now declare it invalid would result in very serious consequences. In view of these facts, we are of opinion that, whether this construction, considered as a new question, is right or wrong, it ought now to be followed and adhered to. An additional reason for such conclusion is the fact that such a construction can only affect the past, inasmuch as the amendment of 1881 on the subject of special legislation has been superseded by the more sweeping one of 1891, adopted in November, 1892. It is also significant that in subdivision 10 of the amendment of 1881 prohibiting the enactment of special laws incorporating any town or village there were omitted the words (found in the Wisconsin amendment), 'or to amend the charter thereof.' Our conclusion, therefore, is that Sp. Laws 1891, c. 175, authorizing the defendant village to issue these bonds, was not a grant of a corporate power or privilege, within the meaning of the constitutional amendment of 1881."

In *State v. Wiswell, supra*, the court held that the constitutional amendment of 1881 "did not impair the legislative power of alteration or repeal in respect to charters granted prior to the adoption of the constitutional amendment, etc."

In this case another village in the state was concerned whose incorporation was provided by Special Laws of 1881, Chapter 46, and amended after the adoption of the 1881 amendment, by Special Laws of 1885, Chapter 30.

In *State v. Porter, supra*, the Supreme Court considered the validity of the act of amendment and consolidation of the charter of the City of Mankato, passed in 1887 by the Minnesota legislature. (See Special Laws of 1887, Chapter 8.) The Court declared this act as really a new charter for the city. Mankato was incorporated originally long prior to the year 1885. A Municipal Court in the city of Mankato was established by Special Laws of 1885, Chapter 119. The Court used the following language:

"That such an act might be styled as amendatory of the charter, or might be made a part of the city charter, either originally or by legislation subsequent to the granting of corporate powers, we do not now question, etc."

In *Green v. Knife Falls Boom Company, supra*, the Court considered the question of the validity of the legislative charter granted to the Knife Falls Boom Company. The Court say:

" \* \* \* \* the strict rule forbidding the granting of additional powers or franchises, while it may be the more logical and satisfactory, treated as an original question, has never in fact been recognized or adopted by the legislature or courts of the state; that this additional provision was open to construction and, during a long course of legislation, the prac-

tical construction placed upon it by the legislature and people has been a liberal one in respect to amendments, and that the court should be very slow to change it, at this late day, for the reason that the extensive and valid legislation affecting corporate charters, so long continued, has come to involve very large public and private interests."

From 1881, to and including the legislative session of 1891, the flood of special legislation continued. Prior to 1881, practically all of the cities of size or consequence in the State, had secured, and were operating under, special legislative charters. During the last two sessions of the legislature, immediately previous to the adoption of the constitutional amendment of 1892, prohibiting further special legislation, more than one thousand special acts were passed, most of which were consolidations or amendments of previous acts. The consideration of general, constructive legislation was hampered.

An examination of the special laws of Minnesota has been made. It is safe to say that the number of special charters granted to cities and villages of the State, during the forty years from the cessation of territorial days, down to 1892, runs into the hundreds, and the number of amendatory and consolidation acts, into the thousands. Minneapolis, the largest city in the State, is still operating under its legislative charter and amendments thereto.

## THE CONSTITUTIONAL AMENDMENT OF 1892.

This amendment reads as follows:

**"Sec. 33. PROHIBITION OF SPECIAL  
LEGISLATION (As amended November 8,  
1892).**

In all cases when a general law can be made applicable no special law shall be enacted; and whether a general law could have been made applicable in any case is hereby declared a judicial question, and as such shall be judicially determined without regard to any legislative assertion on that subject. The legislature shall pass no local or special law regulating the affairs of, or incorporating, erecting or changing the lines of any county, city, village, township, ward or school district, or creating the offices, or prescribing the powers and duties of the officers of, or fixing or relating to the compensation, salary or fees of the same, or the mode of election or appointment thereto; authorizing the laying out, opening, altering, vacating or maintaining roads, highways, streets or alleys; remitting fines, penalties or forfeitures; regulating the powers, duties and practice of justices of the peace, magistrates and constables; changing the names of persons, places, lakes or rivers; for opening and conducting of elections, or fixing or changing the places of voting; authorizing the adoption or legitimation of children; changing the law of descent or succession; conferring rights upon minors; declaring any named person of age; giving effect to informal and invalid wills or deeds, or affecting the estates of minors or persons under disability; locating or changing county seats; regulating the management of public schools, the building or repairing of school houses, and

the raising of money for such purposes; exempting property from taxation, or regulating the rate of interest on money; creating corporations, or amending, renewing, extending or explaining the charters thereof; granting to any corporation, association or individual any special or exclusive privilege, immunity or franchise whatever, or authorizing public taxation for a private purpose. *Provided, however, That the inhibitions of local or special laws in this section shall not be construed to prevent the passage of general laws on any of the subjects enumerated.*

*The legislature may repeal any existing special or local law, but shall not amend, extend or modify any of the same.*

1. This amendment, by its own terms, expressly recognized and continued in force, all special charters of municipalities within the State of Minnesota.
2. It did not operate to suspend or repeal any of them.
3. The power to repeal special or local laws was placed with the legislature, but the power to amend, extend or alter the same was terminated.

The prohibition in the constitutional amendment of 1881, from enacting any special or private laws, granting to any individual, association or corporation, *except municipal*, any special exclusive privilege, immunity or franchise whatever, was intended to bar grants to corporations or individuals constituting acts of incorporation. Neither the constitutional amendment of 1881, or that of 1892, was intended to effect previous delegations of power to municipalities.

A contract for gas or water creates no special privilege or immunity contravening constitutional provisions of Minnesota.

*Brady v. Moulton*, 61 Minn. 185.

Citing *Attorney General v. R. R. Co.'s*, 35 Wis. 425-560.

*Omaha Water Co. v. City of Omaha*, 147 Fed. 1.

For additional authority reference is made to the numerous Minnesota Supreme and Federal Court cases cited under Point 3.

HOME RULE CHARTERS, UNDER CONSTITUTIONAL AMENDMENTS AND LEGISLATIVE ENABLING ACTS, WERE PROVIDED AS A SUBSTITUTE FOR SPECIAL CHARTERS AND SPECIAL LEGISLATION, WITH ALL SPECIAL CHARTERS RETAINED IN FULL FORCE UNTIL EXPRESSLY REPEALED BY THE LEGISLATURE, OR RENDERED INOPERATIVE BY HOME LEGISLATION, EMBODIED IN HOME RULE CHARTER PROVISIONS.

The constitution of Minnesota was amended November 3, 1896, and further amended November 8, 1898. There was embodied therein Section 36 of Article 4, which provided for the adoption of home rule charters by cities and villages.

Section 36, Article 4, of the constitution reads, in part as follows:

"Any city or village in this state may frame a charter for its own government as a city, consistent with, and subject to, the laws of this state etc. \* \* \*

Before any city shall incorporate under this

act, the legislature shall prescribe by law the general limits within which such charter shall be framed."

The act further provided for the classification of the cities of the state on the basis of population.

The legislative enabling act is found at Section 1345, General Statutes of Minnesota for 1913, originally enacted as Chapter 238, Minnesota Laws of 1903.

Section 1345 reads, in part, as follows:

"Subject to the limitations in this chapter provided, it may provide for any scheme of municipal government not inconsistent with the constitution, and may provide for the establishment and administration of all departments of the city government, and for the regulation of all local municipal functions, as fully as the legislature might have done before the adoption of Sec. 33, Art. 4, of the constitution. It may adopt provisions in reference to, or contained in, special laws then operative in said city or village, and provide that such laws, or such parts thereof as are specified, shall continue in force therein."

In respect to the range of these complete powers of local self-government, the Supreme Court of Minnesota, in the case of *Grant v. Berrisford*, 94 Minn., 45, decided December 30, 1904, declared:

"But it (the constitution) does not forbid the adoption of charter provisions as to any subject appropriate to the orderly conduct of municipal affairs, although they may differ in details from those of existing general laws. **THIS IS NECESSARILY SO, FOR OTHER-**

WISE EFFECT COULD NOT BE GIVEN TO THE CONSTITUTIONAL AMENDMENT WHICH FAIRLY IMPLIES THAT THE CHARTER ADOPTED BY THE CITIZENS OF THE CITY MAY EMBRACE ALL APPROPRIATE MUNICIPAL LEGISLATION, AND CONSTITUTE AN EFFECTIVE MUNICIPAL CODE, OF EQUAL FORCE AS A CHARTER GRANTED BY A DIRECT ACT OF THE LEGISLATURE."

This declaration is the settled law of the state.

*Peterson v. City of Red Wing*, 101 Minn. 62.

*Turner v. Snyder*, 101 Minn. 481-482.

*American Electric Co. v. Waseca*, 102 Minn. 329-334.

*State v. Board of Water and Light Commissioners*, 105 Minn. 472-475.

*Schigley v. Waseca*, 106 Minn. 94-101.

*Thune v. Hetland*, 114 Minn. 395-397.

*City of Duluth v. Orr*, 115 Minn. 267-269.

*Hjelm v. City of St. Cloud*, 129 Minn. 240-242.

*State v. International Falls*, 132 Minn. 298-301.

*Standard Salt and Cement Co. v. National Surety Co.*, 134 Minn. 121-125, citing *National Surety Co. v. Architectural Decorating Co.*, 226 U. S. 276, in which opinion *Grant v. Berriesford*, 94 Minn. 45, was considered.

*Park v. City of Duluth*, 134 Minn. 296-299.

*Markley v. St. Paul*, 142 Minn. 356.

In the last named case the Court said:

"The power thus given embraces any subject appropriate to the orderly conduct of municipal affairs."

Appellant challenges the decision of the trial Court determining that there is a valid and subsisting contract between the City of St. Cloud and appellant company, covering the matter of a maximum rate for fuel gas, and in support of its argument asserts that the cases of *Home Telephone Company v. City of Los Angeles*, 211 U. S. 265; *City of San Antonio, et al. v. San Antonio Public Service Company*, 255 U. S. 547, and *Southern Iowa Electric Co. v. City of Chariton, and Iowa Electric Company v. Fairfield, and Muscatine Lighting Company v. Muscatine*, 255 U. S. 539, are controlling and decisive in the case at bar.

In the Los Angeles case the charter of the city—

“ \* \* \* \* gave to the council the power by ordinance \* \* \* to regulate telephone service and the use of telephones within the city \* \* \* and to fix and determine the charges for telephones and telephone services and connections.”

This Court said :

“It is an ample authority to exercise the governmental power of regulating charges, but it is no authority to enter into a contract to abandon the governmental power itself. It speaks in words appropriate to describe the authority to exercise the governmental power, but entirely unfitting to describe the authority to contract. It authorizes command, but not agreement. Doubtless, an agreement as to rates might be authorized by the legislature to be made by ordinance. But the ordinance here described was not an ordinance to agree upon the charges, but an ‘ordinance to fix and determine the charges.’ It authorizes the ex-

ercise of the governmental power, and nothing else. We find no other provision in the charter, which, by any possibility, can be held to authorize a contract upon this important and vital subject."

No California decision holding that the terms of the Los Angeles charter, or similar charter provisions, constitute a contract, could be cited.

In the San Antonio case, a provision of the constitution of the State of Texas was held controlling which provision reads as follows:

"No irrevocable or uncontrollable grant of special privileges or immunities shall be made; but all privileges and franchises granted by the legislature, or created under its authority, shall be subject to the control thereof."

The provisions of the Texas constitution, are fundamentally different from those of Minnesota, as the latter have been interpreted by the Minnesota Supreme Court.

In the Iowa cases, the ordinance considered contained a schedule of maximum rates to be charged for electric current furnished to consumers.

Section 725, Iowa Code of 1897, provided as follows:

"Sec. 725. Regulation of Rates and Service.—They shall have power to require every individual or private corporation operating such works or plant, subject to reasonable rules and regulations, to furnish any person applying therefor, along the line of its pipes, mains, wires, or other conduits, with gas, water, light, or power and to supply said city or town with water for fire protection, and with gas, water,

light, or power for other necessary public purposes (and to regulate and fix the rent or rates for water, gas, heat, and electric light or power) \* \* \* and these powers shall not be abridged by ordinance, resolution, or contract."

Many Supreme Court decisions of Iowa, declaring municipalities to be without power, either by ordinance, resolution, or contract, to fix the charges of public service corporations, are referred to in the decision. Iowa, dealing with a type of Iowa municipal contracts, thus preliminarily settled the question for herself. This Court adhered to the final determination of the question, as found in these Iowa cases.

At the time of the passage of the St. Cloud ordinance, Minnesota statutory provisions were radically different from those of Iowa. They provided, among other things, as follows:

" \* \* \* and every such corporation (public service corporation), obtaining a franchise from a city or village shall be subject to such conditions and restrictions as from time to time may be imposed upon it by such municipality." (Sec. 6137, G. S. 1913, Chapter 19, Laws of 1895.)

Moreover, the legislature of Minnesota has never recalled, or suspended the power delegated to Appelle City under its special charters. They stand today, supplanted merely by the Home Rule Charter of the City, adopted November 28, 1911, and containing at Subdivision 10, of Section 74, Chapter 6, identically the same powers as those bestowed

by the special charters, with the exception that the present granting of public service franchises shall be subject to ratification by the voters of the city. This added condition was imposed by State legislation in respect to Home Rule Charters, as found in Section 1347, G. S. 1913.

The Minnesota District Court, after a comprehensive review of the constitutional provisions, legislation, and decisions of both the Supreme and Federal Courts of Minnesota, declared that the exercise, by Appellee, of its power, under its charter, to make the contract in question, was in harmony with, and was sustained by, the settled public policy of the state.

We shall endeavor, under our next point, to present these decisions and briefly consider the same.

The Federal Court of South Dakota, in the recent case of *Water, Light and Power Company v. City of Hot Springs*, S. D., 274 Fed. 827, has held valid a franchise ordinance of the defendant city, which contained a maximum rate for electrical service, although the constitution of the State of South Dakota provides:

“No \* \* \* law \* \* \* making any irrevocable grant of privilege, franchise or immunity shall be passed.”

The Court refers to the decision of the Circuit Court of Appeals of the Eighth Circuit, in the case of *Omaha Water Company v. City of Omaha*, 147 Fed. 1; 77 C. C. A. 267, holding that a contract for gas or water creates no special privilege or im-

munity contravening such constitutional provision.

The Court held :

"In the case at bar these franchises do fix a maximum rate, and are contracts, because the franchises themselves do not reserve to the city future control of rates to be charged for service, nor do the statutes or constitution of the State of South Dakota, under which the defendant acted in granting the franchises, reserve to the city future control over such rates, nor is there any power in the statutes, as they then existed, given to the city to change these rates. The relation between the plaintiff and defendant was, and is, therefore, contractual, and such a contract cannot be impaired by an amendment of the laws or of the constitution."

The following clear statement is found in another South Dakota case referred to in the last mentioned opinion. The case referred to is that of *City of Watertown v. Watertown Light and Power Company*, 42 S. D. 220; 173 N. W. 739, in which reference is made to the two classes of power residing in a municipality—one, purely governmental in its nature; the other, partaking of administrative or business nature. The same distinction is drawn by Judge Sanborn in the Omaha Water Company case in this circuit.

The Supreme Court of South Dakota say :

"To the first of these belongs the police power, and in the exercise of such police power a city council can in no manner bind its successors, but a city has full power, when authorized either by the Constitution of the state or by legislative enactment, to contract for the rendering of public service by individuals or

private corporations, and in such contract fix the rates to be charged for such service. The granting of a franchise fixing a maximum rate is a contract, and, when the franchise itself does not reserve to the city future control of the rates to be charged for service, or the Constitution or statute under which the city acted in granting the franchise does not reserve to such city future control over such rates, including the power to change same, such franchise becomes a binding contract, no more subject to impairment than would be the contract of individuals."

### POINT 3.

THE DECISIONS OF THE SUPREME COURT OF MINNESOTA, AND OF THE FEDERAL COURTS SITTING THEREIN, COUPLED WITH THE PROVISIONS OF APPELLEE'S CHARTER, SUSTAIN THE VALIDITY OF THE CONTRACTUAL ORDINANCE. THESE DECISIONS CLEARLY SETTLE THE CONSTRUCTION TO BE PLACED UPON THE MAXIMUM RATE PROVISION CONTAINED IN ORDINANCE NO. 160.

#### DECISIONS OF THE SUPREME COURT OF MINNESOTA.

*Reed v. City of Anoka*, 85 Minnesota, 294.

This action was brought by freeholders and taxpayers of the City of Anoka, against the City of Anoka and its officers and Anoka Water Works, Electric Light and Power Company, for the cancellation of certain contracts between the city and

the company. The City of Anoka, organized as a municipal corporation by Special Laws of 1889, Chapter 9, entered into two franchise contracts with the predecessor in interest of the company, one thereof providing for the construction and equipment within the city, of a system of water works for the supply of water to its inhabitants, and for the use of the city, and the other thereof, providing for the establishment and operation of an electric light plant, for the supplying of current to the city and its inhabitants. Both were long term contracts, extending for a period of thirty-one years. The plants were constructed and equipped and put in operation as provided by the franchise contracts.

Limitations in the form of maximum rates were imposed by the ordinance with respect to charges to be made by the grantees, to the inhabitants of the city, for water furnished them. The franchise contract providing for electric lighting, contained no limitations as to rates to be charged private customers.

The Court, in its opinion, uses the following language:

"The authority under which the city acted in entering into the contracts is found in the provisions of its charter, which, among other things, confer upon the municipality in substance: (a) Power to make and establish public pumps, wells, cisterns, and hydrants, and to provide for and control the erection of water works for the supply of water for the city and its inhabitants; (b) power to provide for lighting the city with electricity, gas or

other means, and to control the erection of any works for that purpose, and to grant to any corporation or person the right to occupy its streets for that purpose. There can be no doubt but that these charter provisions confer upon the municipality authority to enter into contracts with individuals for the purpose of providing itself and its inhabitants with a supply of water, and for the purpose of lighting the city.

(Citation of authorities omitted.) \* \* \*

We do not understand appellants to contend that the charter provisions are insufficient to authorize contracts for the purposes stated. What they do contend is that the contracts are void on their face because and for the reason that they cover a term of thirty-one years, and definitely and finally fix and determine the rates of compensation to be paid the grantees for the full period, and thus in effect, barter and contract away legislative functions of the municipality; it being claimed in this behalf that the right to fix rates and charges to be paid for water and light furnished by the grantees under the contracts is purely legislative, and that the city council which entered into the contracts could create no binding obligation in respect to such charges and compensation to extend beyond the term of their office.

The argument is that, though the general right and power to contract does not necessarily involve the exercise of legislative functions, the power to fix rates and charges to be paid by the municipality in consideration of the performance of contracts, does, and that, in consequence, any regulation one council might see fit to make on that subject could be binding in no proper view of the law, upon a succeeding council. The reasoning to support this position is not tenable, and to adopt it as the

law would effectually destroy, or at least render merely nominal, the right of municipalities to enter into contracts of this character, however great their necessities. Large investments of capital, such as are necessary in the equipment of plants of the nature and extent of those involved in the case at bar, could not be induced to venture in such undertakings if it were understood that the income and profits of the enterprise were at the whim and caprice of each succeeding municipal council. Such investments, where made, are permanent in character, and no prudent person would make them under such uncertain and precarious conditions as appellant's theory of the law might result in.

\* \* \* It would be extremely illogical to hold that such contracts could be lawfully made and entered into, provided that they did not extend in duration beyond the term of office of the council by which they were made, and would tend to render the exercise of the power by the municipalities practically valueless. \* \* \* Clearly the court could not interfere and set aside the contracts merely because they fix rates and charges beyond the term of office of the council fixing them. The most the court could do in any such case would be to hold that each succeeding council could, in the exercise of its discretionary powers, by ordinance or resolution, revise the rates previously fixed. **BUT SUCH CANNOT BE HELD TO BE THE LAW.** To so hold would result in overturning contracts heretofore made in good faith, upon which large investments of capital have been made, and place those who have thus invested their money at the mercy of public agitation and clamor. \* \* \* Our conclusion is that the action was properly dismissed by the learned trial court. We may

say, in passing, that these identical contracts were sustained by the United States Circuit Court (Lochren, J.) in the case of *Anoka Water Works, E. L. P. & Co. v. City of Anoka* (C. C.) 109 Fed., 580."

The trial Court said:

"The parallelism between the Reed case and the case at bar is striking. The charter provisions are essentially the same as to the power of the Cities. The ordinance provisions are essentially the same as to the grant of franchises, as to a long time period and as to a maximum charge for service.

The Reed case, in my judgment, is conclusive as to the construction to be placed upon the charter of the defendant city and its power to make the contract in question; also, as to the construction to be placed upon the maximum rate provision contained in the contractual franchise ordinance." (Page 160.)

*City of St. Cloud v. Water, Light & Power Co.,*  
88 Minnesota, 329.

In the year 1887, the city council of St. Cloud passed an ordinance providing for the sale of the water works, then owned by the city, and also granting the right to maintain and operate the system in the city and providing for the furnishing and supplying the inhabitants of the city with three million gallons per day of pure water, suitable for domestic, manufacturing and fire purposes, *at certain specified rates*. The franchise contract was to run for the period of thirty years. The action was commenced for the purpose of cancelling and annulling the franchise and privileges granted by

the ordinance, and to set aside and annul the contract thereby entered into upon the ground that the grantees and their successors had failed to carry out their contract to furnish pure water in the specified quantities.

In 1887, the existing provisions of the charter of the city were much more scant than those contained in the consolidated charter of 1889, to which reference has been made under Point One of this brief.

The Supreme Court held that the obligations thus entered into, as set out in the ordinance, were mutual and constituted a contract.

The Court say:

"The obligations of the parties, as set out in the ordinance, constitute a contract. The city was enabled to enter into such obligation by virtue of its charter powers and the general laws of the state, and was endowed with the right to construct, or cause to be constructed, a water system for the benefit of its inhabitants, and had control of its streets and could contract with reference to their use, for the purpose of extending the system. In the exercise of such power, the city entered into a contract, and granted the privilege of operating and maintaining a system of waterworks within its streets, for the period of thirty years, and the right to furnish water to its inhabitants at certain specified rates. \* \* \* The obligations thus entered into were mutual."

The contract was sustained and the water company given opportunity to comply with its terms.

*Flynn v. Little Falls Electric and Water Co.,*  
74 Minn. 180.

The present City of Little Falls was first organized as a village under Minnesota Special Laws of 1879, Chapter 6, "with the power to establish such regulations for the prevention and extinguishment of fires as it might deem expedient."

Little Falls was incorporated as a village under the provisions of the Laws of 1885, Chapter 145, Sub. 10, Sec. 21, Laws of 1885, empowered the village,—

"To establish a fire department, to appoint the officers and members thereof, and prescribe and regulate their duties; to provide protection from fire by the purchase of fire engines and all necessary apparatus for the extinguishment of fires, and by the erection or construction of pumps, water mains, reservoirs, or other water-works. \* \* \*"

In January, 1889, the Village Council passed an ordinance granting to certain persons, their successors or assigns, for thirty years, the privilege of laying mains in the streets, and contracting to pay for each hydrant, 55 in number, the sum of \$80.00 per year, for the full term of thirty years. The ordinance was accepted by the grantees. The water-works were constructed and put in operation, and the water company complied with the terms and conditions of the contractual ordinance.

The Court say:

"The vice, if any, of this ordinance, viewed as a contract, consists mainly, if not entirely, in the length of time for which it bound the

city to pay annually this sum of \$4,400.00 for fire hydrants. The number of hydrants, the price to be paid per hydrant, and the other provisions of the ordinance, are chiefly important insofar as they bear upon the question of the power of the village or city council to bind the city for so long a period of time. *We have no doubt as to their power to contract with this, or any other water company, with reference to furnishing the city and its inhabitants with water.*"

*City of Red Wing v. Wisconsin-Minnesota Light and Power Company*, 139 Minnesota, 240.

In the year 1872, certain persons obtained an exclusive franchise from the City of Red Wing to establish a gas plant therein and for the laying of certain pipes or mains in its streets, for the purpose of supplying the city and its inhabitants with gas. The duration of the franchise was forty years, with an additional period of twenty years, unless the city elected to buy the plant. Defendant succeeded to the ownership of the plant.

The franchise ordinance was contractual. The ordinance provided for fixed prices for gas for specified periods of time, to be changed only by agreement of the parties, or, in the event that they could not agree, then by resort to the arbitration provided for by the terms of the ordinance. Attempt was made by the Company to increase gas rates without the consent of the City Council and without resort to the stipulated arbitration. The Company was restrained from putting such increased gas rates into effect, and the decision of the trial

Court was affirmed by the Supreme Court, upon appeal.

The only charter power possessed by Red Wing, referring to the contract matter involved, consisted of authority to—

"erect lamps or other means whereby to light the city."

The Court say:

"The rights of the litigants are based solely upon the contract evidenced by the ordinance, and not upon any rate making power delegated to the city. It is not questioned and could not well be, that in a franchise ordinance rates and the manner of fixing them, both for the city and its inhabitants, could be provided for, subject to the right of subsequent legislative interference. \* \* \*

There is no intimation of lack of authority in the city council to grant the franchise here involved. It is manifest that, in granting the same, benefits and privileges were intended to be secured not only to the municipality itself, but to its inhabitants as well, that is, to those who in the future might desire to use gas. Hence, naturally we look for provisions in the franchise guarding or protecting all consumers against an arbitrary fixing of gas prices by defendant. \* \* \*

The city of Red Wing represented not only the municipality but also its several inhabitants in making this franchise contract. And in bringing this action to enforce that contract as to a provision thereof which defendant repudiates, while holding on to the others, the city acts not only as a municipality but as a sort of trustee for its inhabitants."

In the absence of practically all specific charter power, this contract was sustained as binding both parties, subject only "to the right of subsequent legislative interference."

This case was cited with approval by the Supreme Court in the case of *City of Duluth v. Duluth Street Railway*, 145 Minnesota, 55.

#### DECISIONS OF FEDERAL COURTS SITTING IN MINNESOTA.

*Anoka Waterworks, Electric Light & Power Co. v. City of Anoka*, 109 Fed. 580.

Suit to enforce contract rights under ordinances passed by the City of Anoka in 1889, and to set aside, as invalid, certain ordinances purporting to repeal those creating the contracts. One of these franchise ordinances provided for the construction and maintenance of waterworks, for supplying the City and its inhabitants. The other ordinance provided for furnishing electric lights to the city and its inhabitants. The term of each franchise was thirty-one years. In the ordinances, the City agreed to pay certain rates and rentals; and in one of the ordinances maximum rates were fixed for private consumers.

In February, 1899, the city council passed a series of five ordinances, purporting to repeal, in detail, all of the ordinances of 1889, constituting said contract.

In the case at bar, the trial Court sets out at length, at pages 156-159 of the record, the provi-

sions of the Special Laws of 1889, Chapter 9, containing the grants of power to the City of Anoka, and also the material provisions of the ordinances in question, to which we respectfully refer.

As to maximum rates for service, during the continuance of the franchise, particular attention is called to the language of Section 6 of Ordinance 73, quoted in the decision, at page 158 of the record.

The Court said:

"The contracts entered into by the defendant City, by and through the said ordinances of 1889, and acceptances of the same, were valid and binding. The city had full power to enter into such contracts under the provisions of Chapter 4 of its charter, quoted in its answer:

"To provide for and conduct water into and through the streets, lanes, alleys and public grounds of said city, and to provide for and control the erection of waterworks for the supply of water for said city and its inhabitants."

"To provide for the lighting of said city by electricity, gas, or other means; and to control the erection of any works for the lighting of said city."

Franchise ordinances held to be valid and existing contracts, and repealing ordinances held to be invalid and of no effect.

*Fergus Falls Water Co. v. City of Fergus Falls*, 65 Fed. 586.

Exclusive franchise grant for the period of thirty years to lay water mains in the city and furnish the city with water from fifty hydrants, at the rate of \$80.00 each per annum. Action by the Com-

pany to recover on the franchise contract for the water rentals. Claimed by the city that the ordinance was void, for the reason that the City Council had no authority to bind the defendant for such a period in advance.

The charter of the city provided that the City Council shall have power—

“To contract with any person, persons or corporation, for the laying of mains in such streets, or parts of streets and public places as the City shall deem proper, for the convenience and safety of the inhabitants, also for supplying the city with water.”

The Court, in sustaining the validity of the ordinance, said :

“It is evident that the passage of the first ordinance, of August 30, 1893, was brought about by the fact that instead of growing, as was expected, the city had decreased in population and assessable valuation. The law does not favor the idea that a man shall abide by a contract when it is advantageous to him, and repudiate it when it becomes irksome. It is well settled that time and even exclusive contracts may be made by city authorities for the purpose of inducing persons to embark capital in such enterprises as water or gas works, and common sense and experience teach us that without such provisions capital would not be invested. The only question is, is this ordinance so unreasonable, so oppressive, so contrary to public policy that the law will interfere and declare it void? I am of opinion that, if this question had been raised at the outset, it is doubtful whether the city council had authority to give an exclusive contract of this character to any person for the purpose stated;

but as plaintiff's assignor, relying upon the ordinance, in good faith invested a large sum of money in these works, and the city has for 10 years enjoyed the benefits thereof without objection or complaint, and has now the opportunity of purchasing the works at a reasonable valuation, commensurate with the productive value thereof, I do not consider that the ordinance is so unreasonable, oppressive, or contrary to public policy as to be void. Where a contract is sought to be avoided on the grounds above stated, it must be treated as a nullity by the party seeking to avoid it, and must be repudiated *in toto*. He cannot repudiate it, and at the same time reap any benefits derived from it, as the defendant has attempted to do."

\* \* \* *City of Moorhead v. Union Light, Heat and Power Co.*, 255 Fed. 920.

Plaintiff, the City of Moorhead is a municipal corporation operating under a Home Rule Charter adopted by its people March 22, 1900. The charter of the City (Section 223) provided that every ordinance by which the council shall propose to grant any franchise shall contain all the terms and conditions of the franchise, and "it shall be a feature of every franchise so granted that the maximum price of the service shall be stated in the grant \* \* \*."

On May 6, 1912, an ordinance granting the defendant a franchise for the purpose of conducting its gas business for the term of ten years within the city, was adopted by a majority of the voters of the city. The ordinance was accepted by the grantee.

Section 6 of this ordinance fixed the maximum price of gas "at not to exceed \$1.80 per thousand

cubic feet, for illuminating, and \$1.45 per thousand cubic feet for fuel purposes."

Defendant served on the City of Moorhead notice that the rates for gas, after a certain date, would be increased beyond the maximum rate fixed by the ordinance, claiming that, due to the conditions following the European War, all of the elements entering into the cost of manufacturing and distributing gas had so greatly increased that it could not supply gas at the rates fixed by the ordinance, except at an actual loss.

Action was instituted to restrain the company from violating the contract ordinance. The defendant filed an answer and cross-bill, asking for relief from the terms of the contract ordinance fixing the maximum price of gas. Plaintiff moved that the cross-bill be dismissed, upon the ground that it stated no facts entitling the defendant to relief in equity. Defendant's cross-bill was dismissed for want of equity.

The Court said:

"It is conceded in argument that the rule in the Federal Courts in actions at law is that a party is bound by his contract, though performance results in loss. That is settled by the Court of Appeals of this circuit in the recent case of *Berg v. Erickson*, 234 Fed. 817, 148 C. C. A. 415, L. R. A. 1917 A. 648. From a careful review of the authorities Judge Sanborn there states that in some of the State Courts a rule has been developed that, when conditions arise of such a character that the Court can see that they were not within the contemplation of the parties at the time the contract was made, such a change of situation will

excuse a violation of the contract. He concludes, however, as follows:

"But no decision of the Supreme Court or of any Federal Court to this effect has been sought or discovered which goes so far, and the rule adopted by the Supreme Court, which must prevail here, is otherwise."

The Court further said:

"The situation disclosed by the cross-bill, if it is a true picture of the actual effect of the rates upon defendant's business, is such as might lead a just man in private life to modify a contract. It is within the power of the city council to modify a contract. In states having a public utility commission vested with full authority to deal with the subject of rates, such, for example, as Massachusetts, New York, Wisconsin, and California, those commissions have exercised their powers to increase rates when they were unreasonably low, just as freely as to reduce them when they were unreasonably high. Unfortunately there is no commission in the State of Minnesota clothed with such a power. The same is true in North Dakota. A commission which is powerless to protect the public is also powerless to protect the company. Relief against such a situation, however, can be found only in the Legislature, and will not justify Courts in assuming legislative powers."

#### POINT 4.

### IS THE LANGUAGE OF ORDINANCE NO. 160 CONTRACTUAL IN FORM, OR MERELY LEGISLATIVE?

The maximum fuel gas rate prescribed by the

ordinance was a contractual condition of the ordinance. The right given to the grantee to enter upon and occupy the streets and public places of the city, was certainly a contractual result. There was a contractual purpose entertained by the parties to the franchise agreement. The grantee, as required by the ordinance, constructed a gas plant. For fifteen years, appellant and its predecessor, enjoyed the fruits of this contract. Each party is legally estopped from denying a contract. The practical construction placed by the parties on this ordinance shows that each treated it as a contract.

The language in each section of the ordinance is contractual.

Section 1 contains a grant of right and privilege, the language being "the right and privilege is hereby granted, etc."

Section 2 states "the grantee is hereby authorized to produce, manufacture and vend, etc."

Section 3 grants access to, and right of occupation of, the streets and public grounds of the city for the purpose of making all necessary erections and excavations, with the obligation on the part of the grantee to restore same to their original condition, as far as practicable and inflict no injury upon city property.

Section 4 requires the grantee to conform to all reasonable regulations of the city.

Section 5, conceded by appellant to be contractual, provides that "In consideration of the rights and privileges herein granted, the grantee hereby covenants and agrees, etc."

Section 6 contains authority to conduct the business of the grantee in the city and contains the stipulation as to maximum rates. The language of this section is clearly contractual. The price for gas is left to the grantee's judgment, provided, however, that the price does not exceed the maximum amount stated.

Section 7 provides for the purchase by the city, at stated intervals, of the electric and gas works and business of the grantee, a part of the contractual language being as follows:

"The rights hereby granted are upon the express condition that the city of St. Cloud may purchase, etc."

Under Point 1 we have referred to many cases in support of the proposition that the ordinance is contractual and that a contract resulted.

The following additional authority is cited:

*Dillon*, Vol. 3, 5th Ed., pages 2153 and 2236-7.

*McQuillan*, Vol. 4, page 3719.

*Cedar Rapids Gas Light Co. v. Cedar Rapids*,  
223 U. S. 667.

*Knoxville Gas Co. v. Knoxville*, 253 Fed. 217.

For the reasons stated, we respectfully submit that the decreee should be affirmed.

R. B. BROWER,

*St. Cloud, Minnesota,*

*Solicitor and Attorney for Appellee.*

*Decree affirmed.*

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ST. CLOUD PUBLIC SERVICE COMPANY *v.* CITY  
OF ST. CLOUD.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES  
FOR THE DISTRICT OF MINNESOTA.

No. 10. Argued October 2, 1923.—Decided May 26, 1924.

1. A State may authorize a municipal corporation to establish by contract the rates to be charged by a public service corporation for a definite term, not grossly unreasonable in time; and the effect of such a contract is to suspend, during its life, the governmental power of regulating the rates. P. 355.
2. Where a public service corporation and a municipality, having power to contract as to rates, exert it by fixing them for a particular time, the rates are enforceable under the obligation of the contract, even though they become "confiscatory." *Id.*

3. In Minnesota, a city charter, by authorizing the common council to provide for and control the erection and operation of gas works for supplying the city and its inhabitants with heat and light, and to grant the right to erect, maintain and operate such works with all rights incident or pertaining thereto to one or more private corporations, empowered the City to enter by ordinance into a contract, in its proprietary capacity, with a private corporation, providing for the construction and operation of gas works for the period of thirty years, and fixing the rates for gas sold the City and its inhabitants. P. 359.
4. Where a municipality having both the power to contract as to rates and the power to prescribe rates from time to time, exercises the former, the power to regulate is suspended during the contract, and the contract is binding. P. 360.
5. The provisions of the Minnesota Constitution, Art. IV, § 33, prohibiting the legislature from enacting any special or private laws for granting corporate powers or privileges, except to cities, or for granting to any individual, association or corporation, except municipal, any special or exclusive privilege, immunity or franchise whatever, do not apply to contracts made by municipalities under charter powers granted them by the legislature. *Id.*
6. An ordinance under which a gas company, in consideration of rights and privileges granted, covenanted and agreed to erect and operate a plant and sell gas, etc., and which contained a clause by which the grantee was "authorized" to sell at not to exceed a price fixed—*construed* as a contract fixing that as the maximum rate. P. 361.
7. A law authorizing cities to regulate rates of public service corporations, cannot be invoked by a company to increase the rates fixed by its contract with a city before the law was enacted. P. 364.

Affirmed.

APPEAL from a decree of the District Court dismissing for want of equity a bill brought by a gas company to enjoin interference with a proposed increase in its rates.

*Mr. J. O. P. Wheelwright* for appellant.

*Mr. R. B. Brower* for appellee.

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MR. JUSTICE SANFORD delivered the opinion of the Court.

This suit was brought by the Public Service Company to enjoin the City from interfering with a proposed increase in the rates charged for fuel gas.

The allegations of the bill, shortly stated, are: The Company is a public service corporation organized under the laws of Minnesota, and the City, a municipal corporation of that State. In 1905 the City, by ordinance, granted the Company's predecessor, its successors and assigns, the right to construct and maintain for thirty years works for the manufacture, distribution and sale of gas to the City and its inhabitants, and authorized it to sell fuel gas at a rate not exceeding \$1.35 per thousand cubic feet. The grantee's rights were assigned to the Company in 1915, and since then it has been engaged in manufacturing and selling fuel gas under the ordinance.<sup>1</sup> Since 1917 the Company has sold fuel gas at the maximum rate of \$1.35 prescribed by the ordinance. This rate has not yielded, and cannot yield any return on the value of the property devoted to the gas business, has resulted in a constant loss and steadily increasing operating deficit, is inadequate and confiscatory, and deprives the Company of its property without due process of law in violation of the Fourteenth Amendment to the Constitution. The City Commission has refused to entertain a petition to prescribe a rate yielding a reasonable return on the invested capital. To secure a fair and reasonable return, a rate of \$3.39 per thousand cubic feet is necessary. The Company intends

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<sup>1</sup> The ordinance also granted the right to construct and maintain for the same period works for the manufacture and sale of electricity. The bill alleges that the gas and electric operations are conducted as distinct and separate departments; and that neither the Company nor its predecessor has ever sold gas except for fuel purposes, there being no demand for illuminating gas.

to increase its rate to that price. The City, however, has threatened to interfere with the collection of the proposed increased rate, and, unless restrained, will attempt to force the Company to continue to sell gas at the prescribed maximum rate, resulting in controversies and multiplicity of suits, and inflicting irreparable loss and injury upon the Company.

The bill prays that the court adjudge that the maximum rate prescribed by the ordinance is confiscatory and violates the rights of the Company under the Fourteenth Amendment; and that the City be enjoined from interfering with the Company in raising the rate to \$3.39, or attempting in any manner to force it to continue to sell gas at the ordinance rate.

A motion by the Company for a preliminary injunction was denied. Thereafter, on motion of the City, the court dismissed the bill for want of equity, on the ground that there was a "valid and subsisting contract between the City and the plaintiff Company governing the matter of a maximum rate for fuel gas." The Company, by reason of the constitutional question involved, has appealed directly to this Court. Jud. Code, § 238; *Columbus Ry. Co. v. Columbus*, 249 U. S. 399.

It has been long settled that a State may authorize a municipal corporation to establish by an inviolable contract the rates to be charged by a public service corporation for a definite term, not grossly unreasonable in time, and that the effect of such a contract is to suspend, during its life, the governmental power of fixing and regulating the rates. *Home Telephone Co. v. Los Angeles*, 211 U. S. 265, 273, and cases there cited. And where a public service corporation and the municipality have power to contract as to rates, and exert that power by fixing the rates to govern during a particular time, the enforcement of such rates is controlled by the obligation resulting from the contract, and the question whether they are

confiscatory is immaterial. *Southern Iowa Elec. Co. v. Chariton*, 255 U. S. 539, 542, and cases there cited; *Paducah v. Paducah Ry. Co.*, 261 U. S. 267, 273; *Georgia Ry. Co. v. Decatur*, 262 U. S. 432, 438. The existence of a binding contract as to the maximum rate for fuel gas is therefore the controlling issue upon which this controversy depends. Its solution turns upon the questions whether the City had power to contract on this subject by the ordinance of 1905; and, if so, whether the ordinance constituted such a contract.

1. Was the City authorized to enter into a contract as to the rate to be charged for fuel gas? Such authority must clearly and unmistakably appear. *Home Telephone Co. v. Los Angeles*, *supra*, p. 273; *Paducah v. Paducah Ry. Co.*, *supra*, p. 272. Whether it existed depends upon the laws of Minnesota in force at the time. The consolidated charter of the City (Special Laws of 1889, c. 6, p. 131) provided as follows: The City "shall be capable of contracting and being contracted with; and shall have all the powers possessed by municipal corporations at common law." C. 1, § 1. "The common council in addition to all powers herein . . . specifically mentioned, shall have full power and authority to make . . . all such ordinances . . . for the general welfare of the city and the inhabitants thereof, as they shall deem expedient." C. 4, § 4. "The common council shall have full power by ordinance: . . . To provide for and control the erection and operation of gas works, electric lights, or other works or material for lighting the streets and alleys, public grounds, and buildings of said city, and supplying light and power to said city and its inhabitants; and to grant the right to erect, maintain and operate such works, with all rights incident or pertaining thereto, to one or more private companies or corporations . . ; to provide for and control the erection and operation of works for heating the public buildings of said city by

steam, gas, or other means, and supplying light, heat, and power to the inhabitants of said city; to grant the right to erect such works and all incident rights to one or more private companies or corporations, and to control and regulate the erection and operation of such works . . . ; provided, . . . that the common council shall have authority to regulate and prescribe the fees and rates and charges of any and all companies hereinbefore mentioned." C. 4, § 5, cl. 10.

In construing and giving effect to these provisions of the charter we look to the decisions of the Supreme Court of the State. In *Reed v. City of Anoka*, 85 Minn. 294, 297, 298 (1902) the city charter—likewise enacted in 1889—conferred upon the municipality the power "to make and establish public pumps, wells, cisterns and hydrants, and to provide for and control the erection of waterworks for the supply of water for the city and its inhabitants." The city, by ordinance, entered into a contract with individuals for the construction and operation of a system of waterworks for such purposes, for a term of thirty-one years: the city agreeing to pay the grantees a specified sum per year for each hydrant, and restrictions and limitations being imposed as to the charges to be made by the grantees for water furnished the inhabitants. In a suit brought by taxpayers to enjoin the performance of this contract the court said, that there could be "no doubt but that these charter provisions confer upon the municipality authority to enter into contracts with individuals for the purpose of providing itself and its inhabitants with a supply of water. . . . The authorities are very uniform that contracts of this nature are not within the legislative or governmental prerogatives of the municipality, but rather within its proprietary or business powers. Their purpose is not to govern the inhabitants, but to secure for them and for itself a private benefit. . . . It was so held in . . .

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*Flynn v. Little Falls E. & W. Co.*, 74 Minn. 180. . . . While this precise point of distinction was not made in that case, it is authority for the proposition that a municipality does not exercise its legislative functions in entering into contracts of this kind, but only its business or proprietary powers, to which the rules and principles of law applicable to contracts and transactions between individuals apply." In *City of St. Cloud v. Water Co.*, 88 Minn. 329, 332 (1903), there was involved an ordinance passed by the present appellee in 1887, providing for the sale of the City's waterworks to certain persons and granting them the right to maintain the system for the period of thirty years and to furnish water to its inhabitants at certain specified rates; in consideration of which the grantees agreed to extend the system, to furnish water without charge for certain purposes, and to supply a specified amount of pure water for domestic purposes. The original charter of the City (Special Laws of 1868, c. 28, p. 144) made it capable of contracting, vested it with all the general powers possessed by municipal corporations at common law, and gave it the power of establishing and constructing public pumps, wells, cisterns, reservoirs and hydrants. In a suit by the City to set aside the contract entered into by the ordinance for failure of the grantees to furnish pure water in the stipulated quantities, the court said: "The obligations of the parties, as set out in the ordinance, constitute a contract. The city was enabled to enter into such obligation by virtue of its charter powers and the general laws of the state, and was endowed with the right to construct, or cause to be constructed, a water system for the benefit of its inhabitants, and had control of its streets, and could contract with reference to their use for the purpose of extending the system. . . . The obligations thus entered into were mutual. Upon the one hand, the grantees, their successors and assigns, would be protected by the courts in the enjoyment of their

rights,—for instance, in the collection of the hydrant rentals; on the other hand, the courts of the state are open to the city to secure the enforcement of its rights. No serious question can arise as to the nature of the contract obligation. . . .”

In the light of these decisions of the Supreme Court of the State of Minnesota we think it is clear that the City had authority, in 1905, under its charter and the laws of the State, to enter, by ordinance, into a contract, in its proprietary capacity and for the benefit of its inhabitants as well as itself, providing for the construction and operation of gas works for a period of thirty years and fixing the rates to be charged for gas sold to it and its inhabitants. This power existed, under the doctrine of the *Reed Case*, under the provisions of the charter giving the council the power to provide for the control and erection of gas works for the purpose of supplying the City and its inhabitants with heat and light. And we do not think that this contractual power was limited by the proviso that the council should have the right to “regulate and prescribe” the rates and charges of the companies to which it might grant the right of constructing such works. It is true that, standing alone, this proviso, in the absence of any state decision to the contrary, would, under the construction given similar language in *Home Telephone Co. v. Los Angeles*, *supra*, p. 274, be regarded as conferring authority merely to exercise the governmental power of regulating rates, and not authority to enter into a contract. In that case, however, it was pointed out that there was no other provision of the charter authorizing the city to contract as to rates. And in the present case, as the other provisions of the charter gave the City authority so to contract, we must regard the proviso as merely an alternative provision; that is to say, we think that the City might either contract as to the rates, as an incident to its

power of granting the right to construct and operate the public utility, or, if it did not exercise this power to contract, might thereafter "regulate and prescribe" the rates in the exercise of the governmental authority conferred by the proviso. One power, however, is not destructive of the other. And where a municipality has both the power to contract as to rates and also the power to prescribe rates from time to time, if it exercises the power to contract, its power to regulate the rates during the period of the contract is thereby suspended, and the contract is binding. *Paducah v. Paducah Ry. Co.*, *supra*, pp. 272, 273.

We find nothing in conflict with our conclusion as to the City's authority to contract in Section 33 of Article IV of the Minnesota Constitution, as amended in 1881, providing that: "The Legislature is prohibited from enacting any special or private laws in the following cases: . . . 7th. For granting corporate powers or privileges, except to cities. . . . 10th. For granting to any individual, association or corporation, except municipal, any special or exclusive privilege, immunity or franchise whatever." General Laws, 1881, p. 22. Clauses 7 and 10 read together plainly show that the prohibition against the granting of special or exclusive privileges by the Legislature does not apply to the granting of corporate powers or privileges to cities. It did not prohibit the Legislature from granting to the City by the consolidated charter of 1889, the power of contracting in its proprietary capacity in reference to the construction and operation of gas works. If it had had such an effect we cannot assume that it would have been overlooked by the Supreme Court of Minnesota in the *Reed Case*, in which no reference was made to this provision. It is unnecessary, therefore, to consider whether the provisions of the consolidated charter were authorized as an amendment to the original charter of

1862. See *Brady v. Moulton*, 61 Minn. 185. This constitutional provision is obviously entirely different from that involved in *San Antonio v. San Antonio Public Service Co.*, 255 U. S. 547, 549, providing "that no irrevocable or uncontrollable grant of special privileges or immunities shall be made, but all privileges and franchises granted by the legislature, or created under its authority, shall be subject to the control thereof," which was held to prevent a municipality, acting under the authority of the Legislature, from entering into a binding contract as to public service rates. The provision of the Minnesota Constitution makes no reference either to irrevocable or uncontrollable privileges, or to privileges created by a municipality acting under the authority of the Legislature and is, as we view it, merely a limitation upon the direct authority of the Legislature itself, to the extent that we have indicated.

Nor do we find anything in the Laws of 1893, c. 74, p. 189 (General Statutes of 1913, § 6137) in conflict with the conclusion which we have reached as to the power of the City to contract as to rates.

2. Did the ordinance constitute a contract fixing the maximum rate for gas? The intention to so contract must clearly and unmistakably appear. *Paducah v. Paducah Ry. Co., supra*, p. 272. The essential provisions of the ordinance are: The right and privilege is granted to construct and maintain for thirty years works and instrumentalities for the manufacture and distribution of electricity and gas. § 1. The grantee is "authorized" to manufacture and sell electricity and gas to the City and its inhabitants during such period. § 2. The construction shall be done with the least practicable inconvenience to the public and individuals, and the "grantee shall restore" all places where excavated to their original condition as far as practicable, and repair all damage done by such excavation. § 3. In laying down pipes or

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erecting wires the grantee "shall conform" to all reasonable regulations prescribed by the City. § 4. "In consideration of the rights and privileges herein granted, the grantee hereby *covenants and agrees* that it will . . . erect . . . an efficient coal gas generating plant or system of ample capacity, and after the erection thereof will manufacture and offer for sale to the city and its inhabitants coal gas of at least fourteen candle power." § 5. "The grantee is authorized hereby to sell illuminating gas when the works therefor shall have been completed . . . at the price of not to exceed" \$1.85 per thousand cubic feet, "and fuel gas at the rate of not to exceed" \$1.35 per thousand cubic feet, and shall be at liberty to cut off the supply from any person not paying for a period of thirty days. § 6. "The rights hereby granted are upon the express condition" that the City may purchase the electric and gas works of the grantee at specified intervals at the appraised value thereof, as determined by arbitrators to be chosen in a prescribed manner. § 7.

We think that the language of the ordinance, viewed in its entirety, clearly shows that it was the intention of the parties to enter into a contract for the construction of gas works and the manufacture and supply of gas to the City and its inhabitants during the thirty-year period, at the maximum rate prescribed. Although § 6 "authorizing" the sale of fuel gas at a price not exceeding \$1.35, is not phrased in the language of an agreement—as the preceding section whereby the grantee "agreed" to construct the plant and manufacture and sell gas to the City and its inhabitants—it is an essential part of the agreement. It is no less contractual than the provision in § 2 "authorizing" the grantee to manufacture and sell electricity and gas to the City and its inhabitants for thirty years—upon which the Company necessarily relies as the basis of the rights which it now

claims and is seeking to enforce—or than that in § 7 giving the City the right to purchase the plant at an appraised value. The provision that the grantee is "authorized" to sell fuel gas at a rate not exceeding \$1.35, clearly implies that it shall not sell such gas at a higher rate. This is recognized by the bill itself.<sup>2</sup> In this respect the language has the same effect as that involved in *Vicksburg v. Waterworks Co.*, 206 U. S. 496, 508, 516. There the ordinance granted the right to make such charges for the use of water as the grantees might determine, provided that they should not exceed fifty cents for each thousand gallons. This was held to constitute a binding contract fixing the maximum rates for water supplied to private consumers for the period of thirty years as set forth in the ordinance. So in *Reed v. City of Anoka, supra*, p. 296, the ordinance imposed "restrictions and limitations" upon the charges to be made; and in *City of St. Cloud v. Water Co., supra*, p. 332, the ordinance "gave the right" to furnish water at specified rates. And provisions in ordinances granting franchises to street railway companies that the rate of fare shall not be more than five cents, or that the grantee shall not charge a higher fare, are contractual. *Detroit v. Detroit Citizens' Street Ry. Co.*, 184 U. S. 368, 369; *Cleveland v. Cleveland City Ry. Co.*, 194 U. S. 517, 524; *Cleveland v. Cleveland Electric Ry. Co.*, 201 U. S. 529, 532; *Georgia Ry. Co. v. Decatur, supra*, p. 434. And the fact that here the parties intended to contract as to the gas rates is emphasized by the contrast between the provisions of the ordinance as to gas and electricity. While the grantee is authorized to maintain both gas and

<sup>2</sup> There are repeated references in the bill to this provision as fixing a maximum rate, thus: The "maximum rate fixed for the price of gas in the ordinance," par. 36; and similar references to the "maximum rate" in pars. 39, 41, 42 and 44, cl. 1.

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electric works for the period of thirty years, the ordinance specifies the maximum rates for gas but contains no provision as to the rates for electricity; the apparent purpose being to establish definitely by contract the maximum rates for gas but to leave the rates for electricity to be thereafter "regulated and prescribed" by the council from time to time under the power given it by the proviso of the charter.

3. The general provision of the Laws of 1919, c. 469, p. 603, authorizing cities of the class of the appellee "through its city council or like governing body, by ordinance, to prescribe from time to time the rates which any public service corporation supplying gas or electric current for lighting or power purposes within said city may charge for such service", has no application to the present case. Even if, in any aspect, it could otherwise be applicable, it is excluded from operating here by the specific proviso that it shall not be "construed to impair the obligation of any contract or franchise provision now existing between any such city and any such public service corporation." The City, clearly, could not avail itself of this statute to reduce the gas rates below the maximum prescribed in the contract of 1905; and the Company, conversely, cannot under it obtain higher rates. The contract is binding on both parties alike.

The decree of the District Court is

*Affirmed.*

MR. JUSTICE BUTLER took no part in the hearing or decision of this case.